No. 92-9049-CSY Title: Alfred Arthur Sandoval, Petitioner
Status: GRANTED v.
CAPITAL CASE California

Docketed: Court: Supreme Court of California
June 10, 1993
Counsel for petitioner: Multhaup,Eric
Vide:
92-8894 Counsel for respondent: Lungren,Daniel E.

Entry	Date	Note	Proceedings and Orders
1	Jun 10 1993	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jul 15 1993		Brief of respondent California in opposition filed.
4	Jul 22 1993		DISTRIBUTED. September 27, 1993
6	Sep 28 1993		Petition GRANTED. limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 9, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 7, 1993. A reply brief, if any, is to be filed with the Clerk and served uopn opposing counsel on or before 3 p.m., Tuesday, December 21, 1993. Rule 29 does not apply. The cases are consolidated and a total of 90 minutes is allotted for oral argument. **********
7	Oct 21 1993	G	Motion of petitioner for appointment of counsel filed.
8	Oct 27 1993		Record filed.
		*	Original proceedings Supreme Court of California and Superior Court of Los Angeles County (2 BOXES)
9	Nov 1 1993		Motion for appointment of counsel GRANTED and it is ordered that Eric S. Multhaup, Esquire, of San Francisco, California, is appointed to serve as counsel for the petitioner in this case.
10	Nov 3 1993		Joint appendix filed.
11	Nov 9 1993		Brief of petitioner Alfred Arthur Sandoval filed.
12	Nov 17 1993	G	Motion of respondent California for divided argument filed.
13	Nov 22 1993		SET FOR ARGUMENT TUESDAY, JANUARY 18, 1994. (3RD CASE).
14	Nov 29 1993		CIRCULATED.
22	Dec 2 1993	G	Motion of petitioners for divided argument filed.
16	Dec 3 1993	X	Brief of respondent California filed.
17	Dec 3 1993	G	Motion of California District Attorney's Association for leave to file a brief as amicus curiae filed.
15	Dec 6 1993		Motion of respondent California for divided argument GRANTED.
18	Dec 6 1993	G	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
19	Dec 6 1993	X	Brief amicus curiae of United States filed. VIDED.
21	Dec 7 1993	X	Brief amici curiae of Massachusetts, et al. filed.
23	Dec 13 1993		Motion of petitioners for divided argument GRANTED.
24	Dec 13 1993		Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae GRANTED.

No. 92-9049-CSY

Entry	Date	Note	Proceedings and Orders
25	Dec 13 1993		Motion of California District Attorney's Association for leave to file a brief as amicus curiae GRANTED.
26	Dec 21 1993	X	Reply brief of petitioner Alfred Arthur Sandoval filed. VIDED.
27	Jan 18 1994		ARGUED.

No. _____

92-8049

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ALFRED ARTHUR SANDOVAL, Petitioner

v.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

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QUESTIONS PRESENTED

I. Was petitioner deprived of due process and a fair jury trial by the use of constitutionally defective reasonable doubt instructions which invited the jury to base its verdict on improper "moral" considerations rather than on an evidentiary evaluation? (Cage v. Louisiana, 498 U.S. 39 (1990); Sullivan v. Louisiana, ___ U.S. ___ (June 1, 1993).)

II. Was petitioner deprived of due process and freedom from cruel and unusual punishment by the California Supreme Court's failure to conduct a constitutionally adequate harmless error review of the fundamental error recognized in the penalty phase? (Parker v. Dugger, 498 U.S. 308 (1991).)

III. Does the California Supreme Court's astronomical affirmance rate since 1990, outstripping every other capital sentencing jurisdiction in the country, demonstrate a pervasive abdication of its responsibility to conduct constitutionally adequate harmless error review, leaving unredressed the constitutional violations in petitioner's case? (Pensinger v. California, 116 L.Ed.2d 290 (1991) [O'Connor, J., joined by Kennedy, J., dissenting from denial of certiorari, finding the California Supreme Court's "cursory review . . . clearly insufficient"].)

TOPICAL INDEX

		Page
QUESTIONS PRESENTED		i
I.	OPINION BELOW	1
II.	JURISDICTIONAL STATEMENT	1
III.	CONSTITUTIONAL PROVISIONS	2
IV.	STATEMENT OF FACTS	2
V.	PRESENTATION OF THE FEDERAL CLAIMS IN STATE COURT	4
VI.	REASONS FOR GRANTING THE WRIT	4
A.	The Constitutional Defects in the California Reasonable Doubt Instruction	4
1.	The due process deficiencies identified by Cage v. Louisiana and subsequent cases	5
2.	The archaic antecedents of the "moral certainty" language in California	7
3.	The unconstitutional aspects of CALJIC 2.90	8
a.	The gratuitous allusion to "moral evidence"	8
b.	The diluting effect of the qualifier "to a moral certainty"	9
B.	The Manifest Deficiencies of the California Supreme Court's Harmless Error Review in This Case	11
C.	The Pervasive Abdication by the California Supreme Court of Its Responsibility to Provide Constitutionally Adequate Harmless Error Analysis	16
1.	An historical perspective — "A Tale of Two Courts"	16
2.	The Third Court — the astronomical affirmance rate of the California Supreme Court since 1990	18
3.	The absence of functional explanations for the gross disparity in affirmance rates between California and other capital sentencing jurisdictions	20
a.	The California Paragon hypothesis	20
b.	The Random Variation hypothesis	22
4.	The resulting injustice	23
		23
CONCLUSION		25

TABLE OF AUTHORITIES CITED

Cases	Page
Bridgeport Guardian Inc. v. County of Bridgeport 735 F.Supp.1126 (D.Conn. 1990)	22
Brooks v. Kemp 762 F.2d 1397 (11th Cir. 1985)	13
Cage v. Louisiana 498 U.S. 39 (1990)	i, 5, 6, 8
Caldwell v. Mississippi 472 U.S. 320 (1985)	15
Chapman v. California 386 U.S. 18 (1968)	12
Clemons v. Mississippi 494 U.S. 738 (1990)	4, 12, 23
Commonwealth v. Webster 59 Mass. (5 Cush.) 295 (1850)	5, 7
Drake v. Kemp 762 F.2d 1449 (11th Cir. 1985)	13
Dunn v. Perrin 570 F.2d 21 (1st Cir. 1978)	7
Gregg v. Georgia 428 U.S. 153 (1976)	18
In re Marquez 1 Cal.4th 584 (1992)	13, 24
In re Winship 397 U.S. 358 (1970)	5
Jurek v. Texas 428 U.S. 262 (1976)	18
Lindsey v. Baxter Healthcare Corp. 757 F.Supp. 888 (N.D.Ill. 1991)	22
McCleskey v. Zant ___ U.S. ___, 113 L.Ed. 2d 517 (1991)	25
Newlon v. Armontrout 885 F.2d 1328 (8th Cir. 1989)	14
Parker v. Dugger 498 U.S. 308 (1991)	i, 4, 12, 23

TABLE OF AUTHORITIES CITED (cont.)

Cases	Page
Pensinger v. California 116 L.Ed.2d 290 (1991)	i, 16
People v. Brigham 25 Cal.3d 283 (1979)	7, 8
People v. Castro 38 Cal.3d 310 (1985)	9
People v. Deere 53 Cal.3d 705 (1991)	20
People v. Hardy 2 Cal.4th 86 (1992)	21
People v. Hewlett 519 N.Y.S.2d 555 (App.Div. 1987)	6
People v. Kelly 1 Cal.4th 495 (1992)	21
People v. Mincey 2 Cal.4th 408 (1992)	21
People v. Pensinger 52 Cal.3d 1210 (1991)	16
People v. Pinholster 1 Cal.4th 865 (1992)	21
People v. Rincon-Pineda 14 Cal.3d 864 (1975)	8
Perez v. Irwin ___ F.2d ___ (1992 West Law 44920) (2d Cir. 1992)	6
Powers v. Ala. Dept. of Educ. 854 F.2d 1285 (11th Cir. 1991)	22
Proffit v. Florida 428 U.S. 242 (1976)	18
Pulley v. Harris 465 U.S. 37 (1984)	23
State v. Manning 409 S.E.2d 372 (S.C. 1991)	6, 10
State v. Williams 828 P.2d 1006 (Ore. 1992)	10

	Page
Cases	
Sullivan v. Louisiana ___ U.S. ___ (June 1, 1993)	i
Taylor v. Kentucky (1978) 436 U.S. 478	6
United States v. Duncan 850 F.2d 1104 (6th Cir. 1988)	14
United States v. Indorato 628 F.2d 711 (1st Cir. 1980)	6
United States v. Nolasco 926 F.2d 829 (*en banc*) (9th Cir. 1992)	7
Zant v. Stephens 462 U.S. 862 (1983)	23
Constitutional Provisions	
The United States Constitution	
Amendment V	2
Amendment VI	2
Amendment VIII	2, 12, 13
Amendment XIV	2, 12, 13
Statutes	
28 U.S.C. section 1257a	2
Penal Code section 1096	5, 7
Penal Code section 1096a	7
Other	
CALJIC 2.90	5, 7, 8
CALJIC 22	7
Dickens, *A Tale of Two Cities*, chapter one (1859)	16
Kessler, "Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases – a Comparison and Critique," 26 U.S.F. L.Rev. 41, 89 (1991)	13
Shapiro, *To a Moral Certainty: Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 Hastings L.Rev. 153 (1986)	8

	Page
Other	
Uelmen, "Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts," 23 Loyola of Los Angeles L.Rev. 237 (1989)	16-18
Uelmen, "How the Justices Stack Up," Los Angeles Daily Journal, California Supreme Court Round-up (June 4, 1993)	13, 19

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ALFRED ARTHUR SANDOVAL, Petitioner

v.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

Petitioner Alfred Arthur Sandoval hereby petitions for a writ of certiorari to the Supreme Court of California to review its decision affirming his convictions for murder and judgment of death.

I. OPINION BELOW

On December 14, 1992, the California Supreme Court issued a decision affirming petitioner's convictions for murder and sentence of death. This opinion is reported at 4 Cal.4th 155 (1992), a copy of which is attached hereto as appendix A.

II. JURISDICTIONAL STATEMENT

The judgment of the California Supreme Court, affirming petitioner's convictions and death sentence, was entered on December 14, 1992; a petition for rehearing was denied by Order of the California Supreme Court on February 10, 1993. A copy of that Order is attached hereto as appendix B. On April 29, 1993,

this Court granted an extension of time through and including June 10, 1993 to file this petition for writ of certiorari. (No. A-822). This Court has jurisdiction pursuant to 28 U.S.C. section 1257a.

III. CONSTITUTIONAL PROVISIONS

The United States Constitution, Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

The United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.

The United States Constitution, Amendment VIII:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The United States Constitution, Amendment XIV:

> "No State shall make or enforce any law which shall abridge the privileges or immunities to citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws."

IV. STATEMENT OF FACTS

Petitioner was charged in Los Angeles County Superior Court with four counts of murder arising from two incidents occurring in October of 1984. Trial lasted from October 1986 through March 1987. It took the jury two days to return verdicts regarding the October 13, 1984 shootings, in which petitioner acknowledged involvement (but denied culpability for first degree murder), and thirteen days to return verdicts as to the October 31st shootings, in which petitioner denied any involvement whatsoever. The length of the jury deliberations demonstrates considerable debate and difficulty among the jurors

in reaching these verdicts. Moreover, regarding penalty trial, the jury deliberated for five days, from March 12 through March 18, during which time it asked a number of questions of the court and in fact declared a virtually even-split deadlock on March 18, the day before verdicts were reached. The penalty verdicts in this case themselves reveal a fundamental anomaly in California capital sentencing process, with the jury returning three verdicts of life and a single verdict of death, hardly an unambiguous declaration that death was the appropriate punishment and obviously irreconcilable with instructions which directed them to consider the same overall corpus of aggravating and mitigating evidence as to each verdict.

In summary form, the October 13, 1984 shootings occurred in a park in East Los Angeles, where petitioner acknowledged shooting three other Hispanic males, of which the two decedents were shown by post mortem blood analysis to be heavily intoxicated with PCP. Petitioner contended that these shootings were in self-defense, when he arrived at the park in the midst of a fight occurring between these men and another individual.

The October 31, 1984 offenses involved the shootings of Ray and Marlene Wells in their home late in the evening. Ray Wells was a local crime figure involved in drug dealing, receipt of stolen property, and other illegal activities. There were no eyewitness identifications of any perpetrators of that shooting, nor any physical evidence demonstrating petitioner's presence at the time of the offense. The prosecution's principal evidence consisted of bargained-for informer testimony regarding

uncorroborated admissions, whose authenticity was vigorously challenged at trial. Petitioner presented an affirmative alibi defense to these charges as well.

V. PRESENTATION OF THE FEDERAL CLAIMS IN STATE COURT

Each of the claims presented in this petition was raised and presented to the California Supreme Court, either in the appellate briefing, or in the petition for rehearing after the constitutionally inadequate harmless error review was revealed. After the Supreme Court found explicit prosecutorial misconduct in penalty phase in the form of argument that a particular biblical passage supported imposition of the death penalty in this case and that such a jury verdict in this case would be "doing God's work," the California Supreme Court nonetheless affirmed based on a summary reference to factors which since time immemorial have weighed in favor of reversal, not affirmance – the length of jury deliberations and the closeness of the case. Petitioner timely petitioned for rehearing on the ground, inter alia, that the court had "entirely abdicated its responsibility to conduct a constitutionally sufficient analysis of prejudice in conformity with the requirements of the Eighth and Fourteenth Amendments," citing Parker v. Dugger, 498 U.S. 308 (1991) and Clemons v. Mississippi, 494 U.S. 738 (1990) (Petition for Rehearing, argument V, p. 14).

VI. REASONS FOR GRANTING THE WRIT

A. The Constitutional Defects in the California Reasonable Doubt Instruction

The California reasonable doubt instruction given in

this case[1] is derived from the statutory language of Penal Code section 1096, a provision cloned from a definition proposed by the Massachusetts Supreme Court in 1850 (Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320 (1850)). This instruction, with its repeated use of the phrase "moral," first with respect to "moral evidence" and then with respect to "moral certainty," improperly diluted the prosecution's constitutionally imposed burden of proof beyond a reasonable doubt.

1. The due process deficiencies identified by Cage v. Louisiana and subsequent cases

This Court has recently held the reasonable doubt instruction of another state unconstitutional because of deficiencies which included a qualifying phrase "to a moral certainty," the same language contained in CALJIC 2.90. (Cage v. Louisiana, 498 U.S. ___, 112 L.Ed.2d 339 (1990). Cage held that the "moral certainty" language in conjunction with other problems in the instruction unconstitutionally permitted a "finding of guilt based on the degree of proof below that required by the Due Process Clause" (112 L.Ed at 342). More than two decades ago, In re Winship 397 U.S. 358, 364 (1970) held that "the Due Process

[1] The court delivered CALJIC 2.90 as follows:

"The defendant in a criminal action is presumed to be innocent until the contrary is proved. And in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." (RT 798.)

Clause protects the accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." The Louisiana instruction "did at one point instruct that to convict, guilt must be found beyond a reasonable doubt" (Cage v. Louisiana, supra, 112 L.Ed.2d at 342), but acquired unconstitutional baggage by purporting to define or explain reasonable doubt with such synonyms as "grave uncertainty", "actual substantial doubt", and "moral certainty" that the defendant was guilty. Cage specifically condemned "the reference to 'moral certainty' rather than evidentiary certainty" (ibid.).

The key point is obviously that the Due Process Clause ensures the defendant's "right to have the jury deliberate solely on the basis of the evidence. . . . " (Taylor v. Kentucky (1978) 436 U.S. 478, 489), rather than on the basis of the jurors' moral disapproval of the defendant's conduct.

Many other courts have identified the same problem with a reasonable doubt instruction which includes a "moral certainty" qualifier – "moral certainty could be interpreted to mean that the certainty is based on feeling, i.e., moral conviction, rather than facts" (United States v. Indorato, 628 F.2d 711, 721, fn. 8 (1st Cir. 1980)). Perez v. Irwin, 963 F.2d 499 (2d Cir. 1992) echoed "the concern . . . that the use of these words ['doubt to a moral certainty'] might lead a jury to reach a verdict based on feelings rather than on the facts of the case before it." (State v. Manning, 409 S.E.2d 372 (S.C. 1991) [reversing capital murder conviction because of due process deficiencies in "moral certainty" reasonable doubt instruction].) (Accord, People v.

Hewlett, 519 N.Y.S.2d 555, 557 (App.Div. 1987) [holding instruction defining reasonable doubt in terms of "moral certainty" and "reasonable degree of certainty" reversible error]; Dunn v. Perrin, 570 F.2d 21, 24 (1st Cir. 1978); United States v. Nolasco, 926 F.2d 829 (*en banc*) (9th Cir. 1992) [rejecting efforts to assign confusing and potentially diluting explanations to the reasonable doubt standard].)

2. The archaic antecedents of the "moral certainty" language in California

The language of CALJIC 2.90 tracks Penal Code section 1096, enacted by the Legislature in 1872, and amended in 1927 to include the specific language criticized and condemned in the above-cited cases. Penal Code section 1096a states that "in charging a jury, the court may read to the jury section 1096 of this code, and no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given." As noted above, the section 1096 definition was uncritically cloned from a definition proposed by the Massachusetts Supreme Court in 1850 (Commonwealth v. Webster, supra, 59 Mass.(5 Cush) 295, 320). The tenuous history of this language was discussed in detail in Justice Mosk's thoughtful and scholarly concurring opinion in People v. Brigham 25 Cal.3d 283, 292-316 (1979).[2] Justice Mosk pointed out that "the 1850 language of Chief Justice Shaw was already obsolete in 1927, and

[2] Brigham disapproved a different definition of reasonable doubt contained in former CALJIC 22, and did not address the constitutionality of its successor, CALJIC.2.90. Justice Mosk urged the Court to "acknowledge the equally glaring deficiencies . . . of CALJIC 2.90," noting that "[t]he need to do so is obviously more pressing" (25 Cal.3d at 292-293).

it is hopelessly superannuated" by the time of the Brigham decision in 1979 (25 Cal.3d at 295). Justice Mosk then suggested precisely the same solution indicated by this Court in Cage v. Louisiana – to simplify the reasonable doubt instruction to omit any purported explanation or further definition of the easily understood term "reasonable doubt" (25 Cal.3d at 307-316; 112 L.Ed.2d at 342 fn.*).

3. The unconstitutional aspects of CALJIC 2.90

a. The gratuitous allusion to "moral evidence"

There are two defects in CALJIC 2.90. The first is the gratuitous and confusing qualifier that proof beyond a reasonable doubt "depend[s] on moral evidence" (emphasis supplied). What is this "moral evidence" business?[3] While never explained, it certainly suggests a substantial contrast to "factual evidence." Proof of guilt in a criminal proceeding should be limited to evidentiary facts and the logical inferences which may be drawn from them. A determination of guilt is not a place for moralizing, ethical pronouncements, or other similar subjective considerations.

[3] Justice Mosk posed the same question in Brigham, supra – "What in the world is moral evidence?" (25 Cal.3d at 295).

An historical answer is found in Shapiro, *To a Moral Certainty: Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 Hastings L.Rev. 153 (1986). Professor Shapiro traces the phrase "moral evidence" to a now-defunct usage among the educated classes of England and America in the 18th and 19th centuries to refer to testimonial evidence as opposed to physical evidence (id. at 181-184). That meaning has been entirely lost during the past century. Similarly, the phrase "to a moral certainty" connoted (a century ago) the highest possible degree of proof relating to events in the real world, always one notch short of the absolute certainty available only to the physical or mathematical world (id. at 157-158). Professor Shapiro urges that these archaic phrases be scrapped because they do not carry today the particular meaning carried more than a century ago when engrafted into American jurisprudence (id. at 192-193).

However, the phrase "moral evidence" conjures up quasi-religious proceeding in which the faithful "bear witness" to the sins of humankind. The phrase "moral evidence" implicitly legitimizes the jurors' consideration of subjective, ethical concerns raised by the conduct involved. This is wrong because a criminal trial is not an exercise in moral, ethical, or religious judgment; it is an exercise in the objective determination of whether particular events occurred.

In this vein, the phrase "moral evidence" could (again improperly) connote to jurors the concept of evidence regarding the morality of the accused's conduct, again a factor essentially irrelevant to the proper determination of guilt of a particular offense. In sum, the qualifying phrase characterizing the type of proof involved in the trial as "moral evidence" serves only to superimpose an irrelevant subjective/ ethical standard of proof for an objective/factual one.

b. The diluting effect of the qualifier "to a moral certainty"

Next, the concluding phrase "to a moral certainty" has many of the same defects, but exaggerates them. How many times have we as individuals felt "morally certain" that a certain state of events was true, and acted on that certainty, all the while acknowledging that the facts which could actually prove the point were unavailable to us. For example, employers, particularly conscientious ones, make such serious decisions as the firing of an employee when convinced to a moral certainty that the employee has been stealing, while freely acknowledging that the factual "evidence" of theft would not establish guilt

beyond a reasonable doubt. Similarly, parents confront this situation on a daily basis in determining whether their children have or have not done some particular mischief, and act on their beliefs, even though they would most likely not convict the child if put on trial in some hypothetical form of juvenile court with a "beyond a reasonable doubt" standard.

Moreover, the pernicious effects of the phrase "to a moral certainty" are exaggerated where the accused was clearly engaged in some form of conduct viewed as "immoral" by mainstream society, which typically includes the jurors in a case. For example, petitioner here had clearly been involved in the type of violent gang-related activity which is pervasively viewed as rending the City of Los Angeles apart.

Thus, the jury was certainly convinced to a "moral" certainty that appellant was engaged in, from a mainstream view, immoral activities and was most likely an immoral person under that standard. Thus, the instructional language served to obscure the otherwise crucial segregation in the jurors' minds between personally negative responses to the defendant versus the analysis of the prosecution's evidence. The case law set forth in part A above confirms the constitutional defect of inviting the jury to substitute their moral feelings for their impartial analysis. (See also State v. Williams, 828 P.2d 1006, 1029 (Ore. 1992) [Unis, J. dissenting] ["the (moral certainty) instruction here could have been interpreted by the jury to allow its verdict to rest on an improper basis, i.e., moral standards of consideration, rather than evidentiary certainty"]; State v. Manning, supra, 409 S.E.2d at 374 ["moral certainty" instruction

"is misleading in that it allows a juror to base a finding of guilt upon a subjective feeling rather than upon an evaluation of the evidence"].)

In sum, the repeated use of the adjective "moral" in the California beyond a reasonable doubt instruction unconstitutionally draws the jury away from its role as an objective evaluator of the evidence into a more subjective arbiter of moral values.

4. The Reversal Per Se Standard

Sullivan v. Louisiana, supra, recently held that an unconstitutional reasonable doubt instruction requires reversal per se because "the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings" (emphasis in original). Thus, no analysis of prejudice is necessary to determine that reversal is required in this case, but the closeness of the case and the jury's manifest difficulty in reaching guilty verdicts should provide an impetus to see that justice is done in this case.

B. The Manifest Deficiencies of the California Supreme Court's Harmless Error Review in This Case

The California Supreme Court explicitly found prosecutorial misconduct in penalty argument in the form of an assertion to the jury that a particular biblical passage (Romans 13:1-7) affirmatively justified imposing the death penalty in this case, and that a death verdict against petitioner would be a form of "doing God's work," in fact a positive gesture toward appellant to help him "get his soul right" (4 Cal.4th at 192-193). When this argument occurred at trial, defense counsel objected, but

the trial court's refusal to remedy the misconduct cloaked it with a judicial imprimatur. The California Supreme Court, while recognizing the misconduct, entirely abdicated its responsibility to conduct a constitutionally adequate analysis of prejudice in conformity with the requirements of the Eighth and Fourteenth Amendments (Parker v. Dugger, supra; Clemons v. Mississippi, supra). The Supreme Court's rejection of prejudice consumed a scant two sentences and, inexplicably, simply referred to two facts regarding the course of deliberations, facts which from time immemorial have weighed in favor of a finding of prejudice. The length of jury deliberations (five days), coupled with the closeness of the jury split prior to its decision (six-six on two counts and seven-five on two others), in conjunction with the eventual return of three life verdicts versus one death verdict, provides an overwhelming basis to infer prejudice, not the absence of prejudice. Indeed, these factors demonstrate a virtual evidentiary equipoise regarding the penalty determination, and render it far more likely that the improper and inflammatory argument tipped the balance in favor of the one death verdict.

The federal courts have spoken with one voice that lengthy and close jury deliberations weigh in favor of a prejudice finding when a constitutional error has occurred. The California courts were equally clear on that point until this decision. However, without any analysis, the California Supreme Court found that the constellation of jury deliberation factors universally held to support a finding of prejudice inexplicably satisfied the state's burden of proving the misconduct harmless beyond a reasonable doubt. (Chapman v. California, 386 U.S. 18

(1968).) This is yet another in a painful and protracted series of cases in which the California Supreme Court has expanded the harmless error rule in capital cases "beyond the breaking point" (In re Marquez 1 Cal.4th 584, 610 (1992) [Kennard, J., dissenting]), and beyond the pale of the Eighth and Fourteenth Amendments. (See Kessler, "Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases – a Comparison and Critique," 26 U.S.F. L.Rev. 41, 89 (1991); Uelmen, "How the Justices Stack Up," Los Angeles Daily Journal, California Supreme Court Round-up (June 4, 1993).)

Federal courts applying harmless error review to prosecutorial misconduct or other error in a capital case have uniformly found the factors found by the California Supreme Court in this case to militate in favor of reversal. Drake v. Kemp, 762 F.2d 1449, 1459 (11th Cir. 1985) granted habeas corpus relief in a capital case because of prosecutorial misconduct in penalty argument. The nature of the misconduct was much less egregious than in this case, consisting merely of reference to old state judicial decisions which suggested that mercy was an inappropriate consideration in the penalty determination. The Eleventh Circuit found prejudice because of the closeness of the case as to guilt, as indicated by the length of jury deliberations (id. at 1461 ["the jurors deliberated at length before finding Drake guilty"]). Drake cited and relied on Brooks v. Kemp, 762 F.2d 1397, 1402, fn. 27 (11th Cir. 1985) in support of the proposition "that it is appropriate . . . to consider weakness in the evidence of guilt since an important aspect of the jurisprudence is to minimize the risk that an innocent person

will be executed." In this case, the jury not only deliberated for five days at the penalty proceeding, but the jury had deliberated for 13 days with respect to the guilty verdict to which the death judgment related.

Similarly, Newlon v. Armontrout, 885 F.2d 1328, 1337-1338 (8th Cir. 1989) reversed a death sentence because of prosecutorial misconduct in argument, again pointing out the length of jury deliberations before arriving at a verdict as one factor favoring a finding of prejudice. (Accord: United States v. Duncan, 850 F.2d 1104, 1113-1114 (6th Cir. 1988) [reversing conviction because of confusing jury instruction noting that "[t]his was a conscientious jury that deliberated for parts of two days before it asked its questions, deliberated for several hours more after receiving the answers before pronouncing itself deadlocked, and then took several more hours into the next day before reaching its verdicts"].)

The nature of the prosecutor's misconduct in directing the jury to use religious law in its penalty determination to supplement or substitute for secular law was particularly likely to cause prejudice given the evidentiary equipoise between aggravating and mitigating evidence in this case. While petitioner had been convicted of four murders, and evidence of prior violent conduct had been admitted, he presented a very strong case in mitigation of a very brutal and deprived background in an East Los Angeles barrio war zone, in spite of which petitioner demonstrated very strong family ties and the clear capacity for institutional adjustment and conformity, a virtual recipe for a life sentence rather than a death sentence.

Under these circumstances, it is highly likely that the jury resolved its four-day deadlock by recourse to the prosecutor's religious argument. The otherwise anomalous result of affording an individual defendant three life verdicts but one death verdict, where each verdict was necessarily based on the same corpus of aggravating and mitigating evidence unless the jurors violated their instructions, suggests some bizarre and unconstitutional reasoning process in which the jurors afforded the defendant three life verdicts based on his mitigating evidence, and then imposed a single death judgment based on the prosecutor's argument that religious authority not only authorized the death sentence but such sentence was in fact in petitioner's best interests, i.e., a chance "to get his soul right." The prosecutor's most obvious intrusion on the jury's sense of secular responsibility was his exhortation that the imposition of the death penalty in this case would be a form of "doing God's work." Thus, the actual pattern of penalty verdicts provides strong circumstantial evidence indicating that the jury did use the prosecutor's improper argument as the mechanism to resolve their preceding deadlock. The prosecutor's religious argument appears to have been just the balm needed for the pro-life jurors to assuage their consciences for returning a single death judgment. The clear point of the prosecutor's argument was to diminish the jury's sense of responsibility for its penalty decision. (See Caldwell v. Mississippi, 472 U.S. 320 (1985).) The prosecutor in effect told the jury that a vote for death would be in accordance with religious authority, a balm to their consciences, and in fact would be consistent with any feelings of

mercy or leniency they felt toward petitioner. The prosecutor's co-optation, accompanied by a judicial imprimatur, of petitioner's mitigation evidence into a religion-driven factor in favor of the death penalty, is a major error, compounded by the California Supreme Court's failure to conduct a constitutionally adequate harmless error analysis. Two members of this Court were dissatisfied with the harmless error review of the California Supreme Court in People v. Pensinger, 52 Cal.3d 1210 (1991), describing it as "cursory" and "insufficient." (Pensinger v. California 116 L.Ed.2d 290, supra, [O'Connor, J., joined by Kennedy, J., dissenting from denial of certiorari, finding the California Supreme Court's "cursory review . . . clearly insufficient"].) In fact, the harmless error analysis in Pensinger was a paragon of propriety compared to that in this case, where the California Supreme Court took factors weighing in favor of reversal and turned them on their head to support the affirmance.

C. The Pervasive Abdication by the California Supreme Court of Its Responsibility to Provide Constitutionally Adequate Harmless Error Analysis

1. An historical perspective – "A Tale of Two Courts"

In 1989, Professor Gerald Uelmen, dean of Santa Clara University School of Law, reviewed the capital sentencing record of the California Supreme Court for the prior decade (Uelmen, "Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts," 23 Loyola L.A. L.Rev. 237 (1989)). Borrowing a metaphor from Charles Dickens,[4] Professor

[4] See Dickens, *A Tale of Two Cities*, chapter one (1859).

Uelmen contrasted the California Supreme Court's death judgment review from 1979 through 1986 with its record from 1987 through 1989, and found the disparity to be so dramatic as to suggest the existence of "two courts":

> "From 1979 through 1986, the Supreme Court of California reviewed sixty-four judgments of death. Five of them, or 7.8 percent, were affirmed. From 1987 through March of 1989, the Supreme Court of California reviewed seventy-one judgments of death. Fifty-one of them, or 71.8 percent, were affirmed. In two short years, the California affirmance rate for state Supreme Court review of death judgments moved from the third lowest in the United States to the eighth highest. The revolution which demarcates this dramatic shift was the retention election of November, 1986, in which the voters of California removed Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Renoso." (Id. at 237-238.)

Professor Uelmen included in his article a list of the affirmance rates in capital cases from 1977 through 1988 by all state supreme courts (id. at 297), which revealed that in 1986, the California Supreme Court turned on a dime from its historically low affirmance track and virtually overnight, in jurisprudential terms, positioned itself directly within the mainstream of capital sentencing review, right alongside the most experienced capital sentencing jurisdictions Georgia, Texas, and Florida.

The California Supreme Court under Chief Justice Malcolm Lucas established a 71.8 percent affirmance rate for the period 1986-1989. This track record, based on 71 decisions, ranked slightly lower than Georgia (73.1 percent affirmance rate based on 245 decisions), slightly above Texas (67.1 affirmance rate, based on 319 decisions), and above Florida (53.7 percent affirmance rate, based on 443 decisions) (Uelmen, op. cit., Table 1). Nationwide, the mainstream of capital appellate review

was bounded by affirmance rates ranging from 50 percent to 75 percent – the states accounting for 80 percent of all capital sentences reviewed fell within that range.

In sum, the California Supreme Court overnight catapulted itself into a capital affirmance rate falling well within the range staked out by the Supreme Courts of Georgia, Texas, and Florida, the states with the most capital decisions under their judicial belts and with the longest-lived capital sentencing statutes, having passed muster in the 1976 watershed decisions of this Court.[5]

Professor Uelmen viewed the striking turnabout in the California Supreme Court affirmance rate as indicative of a qualitative change in the capital decision-making process, a change so pronounced as to support his hypothesis that there were functionally two courts at work (Uelmen, op. cit., pp. 238-239). However, subsequent developments have revealed that the 1986-1989 California Supreme Court was to be distinctly short-lived.

2. The Third Court – the astronomical affirmance rate of the California Supreme Court since 1990

The California Supreme Court has subsequently undergone a second and equally instantaneous transformation, escalating its affirmance rate from a mainstream 71.8 percent for the years 1987 through 1989 to an astronomical 94.2 percent affirmance rate for the years 1990 through 1992. This affirmance rate outstripped that of every other capital sentencing jurisdiction in the country, as indicated by Professor Uelmen (op. cit., p. 297).

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[5] Proffit v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

The accompanying chart demonstrates that the capital affirmance rates in the more experienced courts of Georgia, Florida, and Texas have remained virtually unchanged from the mainstream record demonstrated through 1989. Indeed, for the years 1990-1992 cumulatively, the affirmance rate for the Supreme Court of Georgia was 70.3 percent; for Florida, 62.6 percent; and for Texas, 76.9 percent. (Uelmen, "How the Justices Stack Up," California Supreme Court Round-up, L.A. Daily Journal (June 4, 1993), p. 10.) The California Supreme Court's 95 percent affirmance rate for the same period must be viewed as astronomical.

CAPITAL AFFIRMANCE RATES
1990-1993*

California, Georgia, Texas, and Florida

State	Number of Death Judgments Affirmed	Number of Death Judgments Reversed	Affirmance Rate
California	86	5	**95.0%**
Georgia	19	8	70.3%
Florida	136	81	62.6%
Texas	60	18	76.9%

* This includes the five 1993 cases decided by the California Supreme Court as of June 1.

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3. The absence of functional explanations for the gross disparity in affirmance rates between California and other capital sentencing jurisdictions

Petitioner has considered whether the California Supreme Court's sudden surge to an unparalleled affirmance rate might be explained by hypotheses regarding penological or jurisprudential factors other than petitioner's claim of an unconstitutional abdication of responsibility in harmless error analysis. However, the apparent alternatives are implausible and untenable.

a. The California Paragon hypothesis

Petitioner first considered whether the trial courts, prosecutors, and defense counsel of California had somehow attained a state of near-superhuman perfection in their respective capital sentencing responsibilities, such that the California Supreme Court has been presented with virtually picture-perfect, error-free death judgments from 1990 through the present. The evidence is clearly to the contrary: A review of the California Supreme Court's decisions from 1990 to the present reveals that in only one of the death penalty affirmances was there found to be an error-free trial (People v. Deere, 53 Cal.3d 705 (1991) [affirmance after retrial, in which defendant did not contest guilt or penalty]). The California Supreme Court noted a total of more than 300 errors, distributed among the remaining 95 affirmances, but found these errors to be individually and cumulatively harmless.[6]

[6] Counsel for petitioner has reviewed all of the California Supreme Court decisions for 1990 and 1991, and most of the 1992-1993 decisions, to tabulate the number of errors therein

Indeed, many of the cases most recently affirmed in 1992 are remarkable for the sheer volume of errors recognized by the California Supreme Court. (See, e.g., People v. Hardy, 2 Cal.4th 86 (1992) [fifteen actual or assumed errors found harmless]; People v. Kelly, 1 Cal.4th 495 (1992) [fourteen actual or assumed errors deemed harmless]; People v. Mincey, 2 Cal.4th 408 (1992) [eight actual or assumed errors found harmless]; People v. Pinholster, 1 Cal.4th 865 (1992) [eight actual or assumed errors deemed harmless].)

Thus, it is simply not the case that the trial courts of California have somehow eradicated error from their proceedings to attain an unparalleled level of perfection unknown throughout the rest of the country. To the contrary, the California Supreme Court's own decisions show a steady rate of error, perhaps even particularly high during the past year.

Given the pervasive incidence of error in the California capital cases reviewed since 1990, petitioner considered a variation on the California Paragon hypothesis, i.e., whether California trial courts, prosecutors, and defense attorneys had somehow managed to confine their errors to petty peccadillos and venal sins of inconsequence, while their counterparts in Georgia, Florida, and Texas routinely committed gross gaffes, amounting to mortal sins fatal to the validity of the judgment. That hypothesis is both untenable on its face and belied by an

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identified. Petitioner in no way suggests that the California Supreme Court's determination of the existence or non-existence of errors is in any way exhaustive with respect to the ultimate adjudications in these cases. Petitioner views the California Supreme Court's acknowledgement of rampant errors as a baseline from which to evaluate its harmless error review.

examination of the nature of the errors in this and other cases. Indeed, the constitutional errors in this case – the prosecution's failure to disclose extensive benefits conferred on its star witnesses; the failure to correct the witnesses' false testimony denying such benefits; and defense counsel's total failure to investigate mitigating evidence – are manifestly of major magnitude in the hierarchy of constitutional infringements.

b. The Random Variation hypothesis

Petitioner has considered a final hypothesis, i.e., that the virtually instantaneous increase in the California affirmance rate and its gross disparity in comparison with other more experienced capital sentencing jurisdictions do not in fact reflect any quantum change in appellate review standard. Rather, petitioner entertains the hypothesis that the apparent alteration in appellate review reflects only a random variation in the court's caseload, suggesting nothing more remarkable than, say, a string of five straight "heads" results while flipping coins. Is it possible that the California Supreme Court has encountered an extended string of truly harmless error cases, a mere curiosity which could happen in any state at any given time pursuant to random factors?

To test this hypothesis, petitioner has employed the well-accepted chi-square test of statistical probability[7] to determine the likelihood that the observed disparities in capital sentencing rates might be simply the result of random factors,

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[7] See, e.g., Powers v. Ala. Dept. of Educ., 854 F.2d 1285, 1295-1298 (11th Cir. 1991); Lindsey v. Baxter Healthcare Corp., 757 F.Supp. 888 (N.D.Ill. 1991); Bridgeport Guardian Inc. v. County of Bridgeport, 735 F.Supp.1126 (D.Conn. 1990).

rather than the result of an identifiable, invidious influence. The application of the chi-square test reveals that there is less than a one-in-a-thousand chance that California's capital affirmance rate since 1990 diverges from that of Georgia because of random factors;[8] there is less than a one-in-a-thousand chance that California's affirmance rate since 1990 diverges from that of Florida because of random factors;[9] and less than a five-in-one-thousand chance that California's capital affirmance rate since 1990 diverges from that of Texas because of random factors.[10]

One is left with the conclusion that the disparity in affirmance rates is entirely due to the internal decision making of the California Supreme Court, rather than to extrinsic jurisprudential or penological factors, or to chance.

4. The resulting injustice

Appellate review by the court of last resort is a constitutional cornerstone for every capital sentencing jurisdiction. (Zant v. Stephens, 462 U.S. 862, 876 (1983); Pulley v. Harris, 465 U.S. 37, 53 (1984).) This Court has recently reemphasized that the state supreme court's review must meet federal constitutional standards to sustain a death sentence. (Clemons v. Mississippi, supra; Parker v. Dugger, supra, ___ U.S. ___, 112 L.Ed.2d 812.) The pervasive abdication by the

[8] The comparison with Georgia yields a chi-square figure of 11.54; $p < .001$.

[9] The comparison with Florida yields a chi-square figure of 30.09; $p < .001$.

[10] The comparison with Texas yields a chi-square figure of 10.10; $p < .005$.

California Supreme Court of its responsibilities renders both the death judgment in this case invalid and casts substantial suspicion over an entire category of capital affirmances by the court. Even the ever-so-rare reversal by the California Supreme Court since 1990 demonstrates defects in its harmless error review. In re Marquez, 1 Cal.3d 584 (1992) unanimously reversed a death sentence based on ineffective assistance of counsel in failing to investigate mitigating evidence (remarkably similar to this case), but affirmed the underlying murder and special circumstance convictions in spite of an equally strong demonstration of ineffective assistance of counsel. Dissenting as to the affirmance of the guilt verdict, Justice Kennard specifically lamented the misuse of the harmless error doctrine:

> "The majority does not dispute defense counsel's incompetence at trial; it finds his inadequacy harmless because of the strong evidence of guilt. But the doctrine of harmless error can only be taken so far. By holding that 17 alibi witnesses are insufficient to cast doubt on the legitimacy of the verdict, the majority stretches it past the breaking point." (1 Cal.4th at 610.)

Accompanying the California Supreme Court's decision in this case is the lengthy, exacting, penetrating, and pointed dissent of Justice Stanley Mosk, who candidly indicates that he is writing "for [his] federal colleagues," "regret[ting] that petitioner must turn to another forum to vindicate his federal constitutional rights" (id. at 617). Not only must petitioner turn to a federal forum for vindication of his rights, but so must the scores of other defendants prejudiced by the absence of meaningful appellate review in California. This Court clearly recognizes that "[f]ederal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the

capacity of the system to resolve primary disputes." (McCleskey v. Zant, ___ U.S. ___, 113 L.Ed. 2d 517, 543 (1991).) So long as the California Supreme Court defaults its appellate review responsibilities, the federal courts will have a significantly larger number of capital habeas cases to adjudicate. Not only has the California Supreme Court perpetuated an intolerable injustice in this cases, it has skewed the entire capital sentencing process in California and unfairly forced the responsibility for rectification downstream to the federal judiciary.

CONCLUSION

Wherefore, for the foregoing reasons, petitioner respectfully requests that this Court grant certiorari, and after full review, vacate petitioner's convictions and his death sentence.

DATED: June 9, 1993

Respectfully submitted,

Eric S. Multhaup
Attorney for Petitioner

jp-6/7/93-30

APPENDIX A

California Supreme Court Decision in
People v. Sandoval, 4 Cal.4th 155 (1992)

[No. S004765. Crim. No. 26405. Dec. 14, 1992.]

THE PEOPLE, Plaintiff and Respondent, v.
ALFRED ARTHUR SANDOVAL, Defendant and Appellant.

SUMMARY

Defendant was convicted of four counts of first degree murder (Pen. Code, § 187), with a multiple-murder special-circumstance finding (Pen. Code, § 190.2, subd. (a)(3)), and one count of attempted murder (Pen. Code, §§ 187, 664). The jury also found that defendant had personally used a firearm in the commission of each offense (Pen. Code, § 12022.5). Defendant had fatally shot two men and had wounded another man during a gang-related confrontation in a park, and had fatally shot a man and a woman in their home approximately two weeks later. The jury returned a verdict of death for the murder of the woman, and verdicts of life imprisonment without possibility of parole for the murders of the three men. (Superior Court of Los Angeles County, No. A760386, Richard P. Kalustian, Judge.)

The Supreme Court affirmed the judgment. As to guilt phase issues, the court held that the trial court did not err in denying defendant's motion to sever, in admitting evidence of defendant's gang affiliation, or in excluding evidence of the alleged culpability of third parties. The court also held that defendant's prior conviction of assault with intent to commit murder was properly admitted for impeachment, and that the trial court properly refused to rule, in advance of defendant's testimony, on his request to limit the scope of cross-examination. The court further held that the prosecutor did not commit misconduct in cross-examining a defense expert as to his bias and suggesting to the jury that the expert was a liar, but that the prosecutor did engage in nonprejudicial misconduct by denigrating defense counsel during closing argument.

As to the penalty phase, the court held that the prosecutor did not improperly cross-examine a defense witness concerning defendant's gang membership, and that the trial court did not err in refusing to give defendant's proposed instruction that age could be considered only as a mitigating factor. The prosecutor did not engage in misconduct, the court held, when he argued the effect of defendant's crimes on the victims and their families, but

did engage in nonprejudicial misconduct by paraphrasing a biblical passage in support of the death penalty. The court further held that the trial court did not abuse its discretion in refusing to declare a mistrial due to jury deadlock, or in requiring a separate penalty verdict as to each murder victim. (Opinion by Panelli, J., with Lucas, C. J., Kennard, Arabian, Baxter and George, JJ., concurring. Separate concurring and dissenting opinion by Mosk, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1) **Criminal Law § 202—Trial—Separate Trials on Different Counts—Severance Motion—Factors.**—When the requirements of Pen. Code, § 954 (severance of criminal charges), are satisfied, a defendant can predicate error on the trial court's refusal to sever charges only by making a clear showing that there is a substantial danger of prejudice requiring that the charges be separately tried. The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a severance motion. Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case.

(2) **Criminal Law § 202—Trial—Separate Trials on Different Counts—Multiple Murder Charges Arising From Different Incidents.**—In a capital homicide prosecution involving four alleged murders committed on two different occasions, the trial court did not err in denying defendant's motion to sever (Pen. Code, § 954). The fact that the evidence concerning the two incidents may not have been cross-admissible was merely one factor suggesting possible prejudice, and while defendant alleged that the evidence concerning one incident was far weaker than that concerning the other, the prosecutor had represented to the trial court that there would be testimony at trial linking the two incidents and adding significantly to the strength of the weaker case. The inflammatory effect of evidence of defendant's gang membership

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as to one incident was neutralized by the fact that the victims were also gang members. Moreover, the fact that the two incidents were joined for trial, without more, was not the reason that the case was a capital one. Finally, while defendant may have desired to testify only as to one incident, he did not explain the nature of his testimony or why he wanted to give only limited testimony.

(3) **Criminal Law § 649—Appellate Review—Harmless and Reversible Error—Particular Errors—Trial—Denial of Severance Motion.**—When a criminal defendant, on an appeal following trial, raises an issue as to the trial court's denial of a motion to sever multiple charges for trial (Pen. Code, § 954), the reviewing court must consider whether, despite the correctness of the trial court's ruling, a gross unfairness has occurred from the joinder, so as to deprive the defendant of a fair trial or due process of law.

(4) **Homicide § 40—Evidence—Admissibility—Evidence of Gang Membership.**—In a capital homicide prosecution, the trial court did not err in admitting relevant evidence of defendant's gang affiliation, which established that defendant and the victims had been members of rival gangs. The fact that the gangs purportedly had been at peace for seven years did not eliminate gang retaliation as a motive for defendant's crimes. On the contrary, such retaliation appeared to have been the only plausible motive, in that the gang of which defendant had been a member had considered a certain park to be its territory, and defendant's victims, who had been members of a rival gang, had been shot in that park, without any other provocation.

[Admissibility of evidence of accused's membership in gang, note, 39 A.L.R.4th 775.]

(5a, 5b) **Homicide § 40—Evidence—Admissibility—Third Party Culpability.**—In a capital homicide prosecution, the trial court did not err in excluding, pursuant to Evid. Code, § 352 (trial court's discretion to exclude evidence), evidence of the alleged culpability of third parties, where, although the defense argued that one of the victims had been the center of a violent criminal operation and that any number of accomplices or rivals could have killed him, there was no evidence of another person's actual motive to commit the crimes. The defense had merely raised the possibility that others had such a motive, and while it did identify two persons with plausible motives, there was no evidence linking those persons to the actual perpetration of the crimes.

(6) **Criminal Law § 292—Evidence—Admissibility—Claims and Defenses of Accused—Third Party Culpability.**—A criminal defendant

has a right to present evidence of the alleged culpability of a third party if it is capable of raising a reasonable doubt about the defendant's own guilt. That rule, however, does not require that any evidence, however remote, must be admitted to show a third party's possible culpability. Evidence of another person's mere motive or opportunity to commit the crime, without more, will not suffice to raise a reasonable doubt about the defendant's guilt. Rather, there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.

(7) **Homicide § 58—Evidence—Admissibility—Documentary Evidence—Entire Writing to Explain Part.**—In a capital homicide prosecution in which defendant alleged that one of the victims had been the center of a violent criminal operation and that any number of accomplices or rivals could have killed him, the trial court properly excluded evidence consisting of an appointment book and weekly planners found in the victim's home, even though the prosecution had been permitted to introduce two slips of paper, bearing defendant's nickname and another name, which had been found clipped to the appointment book. Evid. Code, § 356, does provide that where part of an act, declaration, conversation, or writing is given in evidence, then any other act, declaration, conversation, or writing that is necessary to make it understood may also be given in evidence. The book and the weekly planners, however, were not part of a writing given in evidence by the prosecution, and were not necessary to an understanding of the slips of paper.

[See 1 Witkin, Cal. Evidence (3d ed. 1986) §§ 319-320.]

(8) **Criminal Law § 308—Evidence—Admissibility—Evidence of Other Crimes or Misconduct—Exceptions to Rule of Inadmissibility—Impeachment—Prior Conviction Involving Moral Turpitude.**—In a capital homicide prosecution, the trial court did not err in ruling that defendant's prior conviction of assault with intent to commit murder was admissible for impeachment purposes, where the trial court followed the proper analysis and properly concluded that defendant's prior conviction involved moral turpitude, and then exercised its discretion under Evid. Code, § 352, to conclude that the probative value of the evidence outweighed its prejudicial effect. The trial court did note that it could not assess the impact of the prior conviction on defendant's testimony because no offer of proof as to that testimony had been made. It did not, however, state that such an offer of proof was required. In fact, it noted that California law did not require such an offer of proof at the time. Moreover, due to the similarity of the prior

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and one of the charged crimes, the court offered to sanitize the prior by allowing reference to it only as a prior felony conviction. It did not abuse its discretion in doing so.

(9) **Criminal Law § 288—Evidence—Admissibility—Discretion of Trial Court—Proposition 8.**—The intention of the drafters of Prop. 8 was to restore the trial court's discretion as visualized by the Evidence Code and to reject the rigid, black letter rules of exclusion that had been grafted onto the Evidence Code by decisions of the California Supreme Court.

(10) **Criminal Law § 217—Trial—Course and Conduct of Trial—Cross-examination of Defendant—Trial Court's Refusal to Limit Scope.**—In a capital homicide prosecution involving four murders allegedly committed in two separate incidents, in which defense counsel indicated that defendant desired to testify concerning self-defense as to one incident, but not to testify at all concerning the other incident, defendant's right to testify on his own behalf was not violated when the trial court refused to rule, in advance of defendant's actual testimony, on his request to limit the scope of cross-examination to the incident about which he planned to testify. While defense counsel argued that the two incidents were entirely separate and that direct and cross-examination could be so limited, counsel gave no further details as an offer of proof. Moreover, the prosecutor argued that there was an evidentiary spillover between the two incidents. Thus, the trial court acted well within its discretion in denying defendant's request.

(11) **Criminal Law § 454—Argument and Conduct of Counsel—Prosecutor—Closing Argument—Comment on Witnesses—Calling Defense Expert Liar.**—In a capital homicide prosecution, the prosecutor did not engage in misconduct in cross-examining a defense forensic psychiatrist as to his interest in helping the defense, eliciting an admission that the expert had testified differently in other cases concerning the distinction between alcohol and PCP intoxication, and then arguing to the jury that the witness was a liar on the basis of that admission. The prosecutor was entitled to question the expert's testimonial consistency and possible bias, and referring to testimony as "lies" is an acceptable practice as long as the prosecutor argues inferences based on the evidence rather than personal belief. The prosecutor's argument met that requirement, and amounted to nothing more than vigorous, yet fair, argument. In any event, defendant waived any allegation of error as to the prosecutor's comment that the expert was a liar, since he failed to object to it during trial.

(12) **Criminal Law § 448—Argument and Conduct of Counsel—Prosecutor—Examination of Witnesses—Cross-examination of Defense Alibi Witness—Concerning Defense Counsel's Assistance in Fabricating Testimony.**—In a capital homicide prosecution involving two alleged sets of murders, the prosecutor did not improperly suggest that defense counsel had colluded with an alibi witness in fabricating his testimony, where the witness contended he and defendant had traveled together to a ranch in Mexico before the second set of murders and that defendant was there at all crucial times, and the prosecutor, noting that the witness's arrest near the border on the day he supposedly went to Mexico had not been revealed during direct examination, asked the witness if defense counsel had tried to avoid the subject. Similarly, it was not improper for the prosecutor to ask the witness if defense counsel had explained to him that it was necessary to state that defendant had been in Mexico on a certain day, and that the witness would be liable as an accessory after the fact if he admitted that he knew defendant had committed an earlier set of murders at the time they supposedly went to Mexico. In any event, defendant waived the point for purposes of appeal by failing to object at trial and request a timely admonition.

(13) **Criminal Law § 559—Appellate Review—Presenting and Reserving Objections—Argument and Conduct of Prosecutor—Expressing Personal Disbelief in Testimony of Defense Alibi Witness.**—In a capital homicide prosecution, defendant waived his contention on appeal that the prosecutor committed misconduct on cross-examination of a defense alibi witness by asking the witness when he was going to stop lying, thereby expressing the prosecutor's own personal disbelief in the witness's testimony, where defendant failed to object to the prosecutor's question, and any harm could have been cured by a prompt admonition.

(14) **Criminal Law § 448—Argument and Conduct of Counsel—Prosecutor—Examination of Witnesses—Cross-examination of Defense Alibi Witness—Improper Impeachment With Prior Drug Arrest.**—In a capital homicide prosecution, defendant was not prejudiced by the prosecutor's allegedly improper attempt to impeach an alibi witness with evidence of a drug arrest, where the prosecutor, in questioning the witness as to his arrest as an accessory to murder in the present case, queried, "You were also arrested for something else, weren't you?", and where defense counsel's objection to the question was sustained, although no admonition was requested or given. The jury was already aware that the witness had been arrested for possession of methamphetamines, and the jury was given the standard instruction stating that a

question was not evidence and that when an objection to a question was sustained, the jurors should not guess what the answer might have been (CALJIC No. 1.02).

(15) **Criminal Law § 448—Argument and Conduct of Counsel—Prosecutor—Examination of Witnesses—Cross-examination of Defense Alibi Witness—Questioning Witness on Failure to Offer Exculpatory Information.**—In a capital homicide prosecution, defendant could not have suffered any significant prejudice from alleged misconduct that occurred when the prosecutor cross-examined an alibi witness about his failure to volunteer his exculpatory information to the police prior to trial. Although defendant contended that the prosecutor knew that the witness had been arrested in the present case as an accessory to murder and had invoked his right to remain silent, the witness himself explained that that he had never told the police about the alibi because he had refused to be interviewed, and further stated on redirect examination that he had given the exculpatory information to the defense attorneys and their investigators a year before the trial.

(16) **Criminal Law § 448—Argument and Conduct of Counsel—Prosecutor—Examination of Witnesses—Cross-examination of Defense Alibi Witness—Concerning Conversation Outside Courtroom.**—In a capital homicide prosecution, there was no basis for branding, as being in bad faith, the prosecutor's questioning regarding a conversation between the prosecutor, defense counsel, and an alibi witness that occurred in an elevator after the witness had given his testimony on direct examination. The record showed only that on the morning after the conversation occurred, defense counsel reopened direct examination, questioning the witness about the conversation, and the witness testified that the prosecutor had threatened him by stating that someone behind the crimes was going to jail. The prosecutor then asked the witness whether the alleged threat had been in response to defense counsel's question, "Well, how do you guys like what happened in there today?" Defense counsel's objection to the question was overruled, and the witness stated that he only heard defense counsel say, "what's up?" None of the police officers who overheard the conversation were called as witnesses by either side.

(17a, 17b) **Criminal Law § 451—Argument and Conduct of Counsel—Closing Argument—Denigration of Defense Counsel—Accusing Defense Counsel of Misleading Jurors and Perpetrating Fraud on Court.**—In a capital homicide prosecution, although the prosecutor was entitled to argue the inconsistencies in the evidence and even to

characterize inconsistent testimony as "lies," it was improper to denigrate defense counsel rather than the evidence by referring to defense counsel's supposed attempts to mislead the jury and by accusing defense counsel of perpetrating a fraud on the court. Such personal attacks on opposing counsel are improper and irrelevant to the issues. The prosecutor's references to counsel's reaction to particular testimony was also improper, for the same reason. The remarks, however, were a small part of the prosecutor's very lengthy review of the evidence, and were clearly recognizable as an advocate's hyperbole. Thus, there was no reasonable probability that the jury would have reached a more favorable result absent the objectionable comments.

[See **Cal.Jur.3d (Rev)**, Criminal Law, § 2954; 5 **Witkin & Epstein**, Cal. Criminal Law (2d ed. 1989) § 2914.]

(18) **Criminal Law § 451—Argument and Conduct of Counsel—Closing Argument—Denigration of Defense Counsel—Expressing Personal Opinion on Defendant's Guilt.**—A prosecutor may vigorously argue his or her case, marshalling the facts and arguing inferences to be drawn therefrom. The prosecutor may not, however, express a personal belief in the defendant's guilt, in part because of the danger that jurors may assume that there is other evidence in the prosecutor's command on which that conclusion is based. It is also improper for the prosecutor to imply that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case. It is not necessary to find that such an implication impinges upon the defendant's constitutional right to counsel. Instead, it is sufficient to note that the defendant's conviction should rest on the evidence, not on the derelictions of his or her counsel. Casting uncalled-for aspersions on defense counsel directs attention to largely irrelevant matters and does not constitute comment on the evidence or argument as to inferences to be drawn therefrom.

(19) **Criminal Law § 559—Appellate Review—Presenting and Reserving Objections—Argument and Conduct of Prosecutor—Expressing Personal Opinion on Defense Case.**—In a capital homicide prosecution, in which defendant claimed that the prosecutor engaged in three instances of misconduct in the form of improperly expressing a personal opinion regarding the defense case, defendant waived, for purposes of appeal, his argument with respect to two of the instances, having failed to raise timely objections to the comments at trial. As to the third instance, the prosecutor's statement that he shook his head in disbelief every time he thought about one defense witness's testimony

was made in the context of reviewing the discrepancies in defense testimony, and it was not likely that the jury would have understood it as being based on anything outside the record.

(20) **Criminal Law § 455—Argument and Conduct of Counsel—Prosecutor—Closing Argument—Comment on Defendant's Failure to Testify.**—In a capital homicide prosecution, the prosecutor did not engage in prejudicial misconduct during closing argument by referring to defendant's failure to testify at trial, where the prosecutor stated that he had forestalled defense testimony by preemptively proving that defendant had not needed glasses at the time of the killings, and that if that fact had not been proven, the jury would have heard defendant claim that he shot at the victims during a fight in the park because he was not wearing his glasses at the time and could not see well. The trial court sustained defense counsel's objection and admonished the jury to disregard the comments to the extent they reflected on defendant's failure to testify. While the trial court overruled defendant's later objection to similar comments by the prosecutor during rebuttal, the earlier admonition was sufficient to cover these comments, which were clearly harmless, having been a minor feature in the prosecutor's lengthy argument.

(21) **Criminal Law § 451—Argument and Conduct of Counsel—Prosecutor—Closing Argument—Referring to Defendant's Neat Appearance in Court as Ploy.**—In a capital homicide prosecution, in which defendant contended he had shot at certain victims because he had not been wearing his eyeglasses at the time of the killings, and defendant had worn a suit and reading glasses and had been clean-shaven during trial, defendant waived his claim on appeal that the prosecutor engaged in misconduct by referring to the defendant's courtroom appearance as a "ploy" and by asserting that defendant did not need to wear the glasses at all times during the trial. Defendant failed to object to the comments, and any error could have been cured by a timely admonition. In any event, the statements could not have had a prejudicial effect in light of the overwhelming evidence of the killings.

(22) **Criminal Law § 520—Judgment, Sentence, and Punishment—Penalty Trial—Prosecutorial Misconduct—Cross-examination of Defense Expert Concerning Defendant's Gang Membership.**—In the penalty phase of a capital homicide prosecution, the prosecutor did not engage in any misconduct in cross-examining a gang consultant who had been called by defendant to rebut evidence of defendant's

gang affiliation that had been properly admitted in the guilt phase. The witness had testified that the gang to which defendant had belonged had been reformulated into a neighborhood association with the goal of keeping the peace, that defendant had not been involved in gang activities since before the murders occurred, and that he was working to keep other young people out of gangs. The prosecutor was entitled to attempt to negate that evidence by asking the witness if it was true that the gang to which defendant belonged was one of the most violent gangs in its area and was responsible for most of the murders in that area in a 10-year period, including the year the present murders were committed, and whether defendant had been one of the gang's most active members.

(23) **Criminal Law § 448—Argument and Conduct of Counsel—Prosecutor—Examination of Witnesses—Defense Reputation Witness—Cross-examination Concerning Defendant's Bad Acts—Good Faith Requirement.**—The prosecution may inquire of a defense reputation witness whether the witness has heard of an act or conduct by the defendant that is inconsistent with the witness's testimony, as long as the People have a good faith belief that the act or conduct about which they wish to inquire actually took place.

(24) **Criminal Law § 523—Judgment, Sentence, and Punishment—Penalty Trial—Instructions—Age as Aggravating or Mitigating Factor.**—In the penalty phase of a capital homicide prosecution, the trial court did not err in refusing to give defendant's proposed special instruction that his age at the time of the crimes could be considered only as a mitigating factor, and instead giving CALJIC No. 8.84.1, which simply states that the jury may consider the age of the defendant at the time of the crime in determining the appropriate penalty. Mere chronological age should not, in and of itself, be deemed either aggravating or mitigating. The word "age" in the statutory sentencing factor is used as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty. Thus, either counsel may argue any such age-related inference in every case. Similarly, it was not improper for the prosecutor to argue that it was an aggravating factor that defendant, who was 26 years old at the time of the crimes, was only enough to know the difference between right and wrong.

(25) **Criminal Law § 522—Judgment, Sentence, and Punishment—Penalty Trial—Argument—Impact of Crime on Victim's Family.**—The injury inflicted by a capital defendant, including evidence about

the victim and the impact of the crime on the victim's family, is one of the circumstances of the crime, evidence of which is admissible under Pen. Code, § 190.3, factor (a). Thus, in the penalty phase of a capital homicide prosecution, in which defendant had introduced a photograph showing him as a young boy at his father's funeral in order to illustrate his difficult childhood, the prosecutor did not engage in misconduct by telling the jurors that when they looked at the photograph, they should think of the funerals of defendant's victims, and that they should think of the victims' parents and families.

(26a, 26b) **Criminal Law § 522—Judgment, Sentence, and Punishment—Penalty Trial—Argument—Invoking Biblical Passage as Support for Death Penalty.**—In the penalty phase of a capital homicide prosecution, the prosecutor engaged in misconduct during rebuttal argument by paraphrasing a Biblical passage commonly understood as providing justification for the death penalty, where the prosecutor's comments were not fairly responsive to defense counsel's closing argument. While a prosecutor may refer to matters that are not in evidence if they are common knowledge or are illustrations drawn from common experience, history, or literature, he or she may not invoke higher or other law as a consideration in the jury's sentencing determination. Nevertheless, the prosecutor's misconduct was not prejudicial, since the jurors deliberated for four days before indicating they were split on all four murder counts, then deliberated another day before returning verdicts of life without possibility of parole on three counts and a death penalty verdict on only one count. Under such circumstances, there was no reasonable possibility that the jury would have reached more favorable verdicts had the misconduct not occurred.

(27) **Criminal Law § 522—Judgment, Sentence, and Punishment—Penalty Trial—Argument—Invoking Biblical Passage as Support for Death Penalty—Extent of Permissible Argument.**—Penalty determinations are to be based on the evidence presented by the parties and the legal instructions given by the court. Reference by either party to religious doctrine, commandments, or biblical passages tending to undermine that principle is improper. While the defense in a capital penalty trial must be allowed some latitude in its presentation of mitigating evidence, that latitude does not include exhortation of religious canons as a factor weighing against the death penalty. Were the defense to present such an argument, it would be subject to objection by the prosecution and possible like-kind argument in rebuttal. What is objectionable is reliance on religious authority as supporting or opposing the death penalty. All reference to religion or religious figures is not ruled out as long as the reference does not purport to be a religious law or commandment.

(28) **Criminal Law § 261—Trial—Verdict—Rendition—Jury Deadlock—Trial Court's Discretion to Require Further Deliberation.**—The determination of whether there is a reasonable probability that a jury can reach an agreement on a verdict, so as to warrant further deliberation, rests in the discretion of the trial court. The court must exercise its power, however, without coercing the jury, so as to avoid displacing the jury's independent judgment in favor of considerations of compromise and expediency. The question of coercion necessarily depends on the facts and circumstances of each case.

(29) **Homicide § 98—Verdict, Sentence, and Punishment—Verdict—Jury Deadlock—Trial Court's Discretion to Require Further Deliberation.**—In the penalty phase of a capital homicide prosecution, the trial court did not abuse its discretion in refusing to declare a mistrial under Pen. Code, § 1140 (no reasonable probability of agreement on verdict), even though the jury had deliberated fourteen and one-half hours before indicating that it was split on each of the four murder counts, and a poll of the jury revealed that no juror felt it was reasonably possible that an agreement could be reached. Given that the trial had lasted five months, it was not unreasonable to request that the jury spend a little more time deliberating. Moreover, the fact the order to continue deliberating was unaccompanied by further instructions, and the following day the jury reached verdicts of life imprisonment without possibility of parole on three counts and a death sentence on the fourth count did not suggest that the trial court coerced the jury or that the verdicts resulted from compromise and expediency. The jury may have felt that only one death verdict was necessary, and that the one murder on which it did return a death verdict was the most egregious, since the victim had no involvement with defendant.

(30) **Homicide § 98—Verdict, Sentence, and Punishment—Verdict—Multiple Murders—Requiring Separate Verdict as to Each Murder Victim.**—In the penalty phase of a capital homicide prosecution, the trial court did not err in requiring the jury to return a separate penalty verdict as to each murder victim. A defendant who kills more than one person may be convicted and punished for each murder. The multiple verdicts did not obscure the overriding constitutional value of reaching a comprehensive determination of the appropriateness of the death penalty considering all aggravating and mitigating evidence, nor did they invite compromise verdicts, or place undue emphasis on the characteristics and status of each individual victim.

(31) **Criminal Law § 523—Judgment, Sentence, and Punishment—Penalty Trial—Instructions—Imposition of Death Penalty Where Aggravating Factors Outweigh Mitigating Factors.**—In the penalty phase of a capital homicide prosecution, the trial court did not err in giving CALJIC No. 8.84.2, which states that in order to impose the death penalty the jury must be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors that they warrant death instead of life in prison without possibility of parole. While that instruction did not specifically state that the jury was required to find that the aggravating factors outweighed the mitigating factors, the court gave a further instruction that the weighing of the aggravating and mitigating factors was not a mere mechanical counting of factors, that the jury was free to assign whatever moral or sympathetic value it deemed appropriate to each factor, and that it was to consider the totality of aggravating factors with the totality of the mitigating factors. These instructions, taken together, were sufficient to inform the jury that it could return a death verdict only if the aggravating circumstances outweighed the mitigating circumstances.

COUNSEL

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OPINION

PANELLI, J.—Defendant was convicted by a jury in the Los Angeles County Superior Court of four counts of first degree murder (Pen. Code, §

187)[1] with a multiple-murder special-circumstance finding (§ 190.2, subd. (a)(3)), and one count of attempted murder (§§ 664/187). The jury also found that defendant personally used a firearm in the commission of each offense (§ 12022.5).

The jury returned a verdict of death as to the conviction of murder of Marlene Wells and verdicts of life without possibility of parole as to the convictions of murder of Gilbert Martinez, Anthony Aceves, and Ray Wells. The appeal is automatic. (§ 1239, subd. (b).)

GUILT PHASE FACTS

Prosecution Case

1. *Belvedere Park Murders.*

About 2:30 a.m. on October 14, 1984, Adela Rodriguez and a group of girls (Zebba, Susie, Dianne, Corine, and Yvonne), along with Gilbert Martinez and Manuel Torres, drove to Belvedere Park in East Los Angeles. Anthony Aceves and a man named Jack drove to the park in another car. Once there, the group broke up into couples. Adela walked off with Gilbert Martinez.

Adela and Gilbert started walking back to the car after Zebba called for them to return. A fight was about to start near the car between people Adela did not know. As Adela was getting in the car, Gilbert said, "Let me get my friends first." As Gilbert approached his friends, Adela saw defendant shoot Gilbert in the head at close range. Defendant also shot Anthony in the head, and he shot at Manuel as the latter ran away. Defendant turned and pointed the gun at Adela and her friend Susie. Susie backed the car out, and drove off. Defendant's car followed them for a short distance. The girls then returned to the park to check on their friends. Gilbert died in Adela's arms.

Susie Martinez testified that she drove Adela and the others to Belvedere Park on October 14, 1984. She walked around the park with Anthony Aceves until they were called back to the car. When they arrived at the car, she saw Carlos Tostado fighting with someone. The fight stopped, and she noticed defendant standing next to a brown Monte Carlo arguing or talking with Anthony. Gilbert was nearby. Defendant pulled out a gun and shot Gilbert and Anthony in the head. After Gilbert fell to the ground, defendant shot him again. Susie did not see Gilbert or Anthony with any weapons, nor did she them make any aggressive gestures.

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[1]All statutory references hereafter are to the Penal Code unless otherwise indicated.

Carlos Tostado testified that he drove a white Monte Carlo to Belvedere Park on October 14, 1984. Several friends were with him. Another car drove up with four young women and three men. Tostado fought with one of the men. As the fight was breaking up, defendant, also known as "Chato," and Eugene Valenzuela, also known as "Pelon," drove up in a tan Monte Carlo. Defendant got out of the car, grabbed one of the men by the neck and shot him. Tostado had known defendant for about 10 years and was a member of the same gang, Arizona Marivilla. The victims belonged to a different gang, Mariana Marivilla.

Tostado admitted that he had lied to the police when he gave them statements on October 14, October 16, and December 12, 1984. He acknowledged that he was on probation for using phencyclidine (PCP) at the time of his testimony.

The prosecution read the preliminary hearing testimony of Manuel Torres, who had since died in an unrelated auto accident. He had gone to Belvedere Park in Susie's car with Gilbert Martinez and several young women. As they were getting into the car to leave, Gilbert stopped to talk to a group of people. Anthony Aceves left the car to "back up" Gilbert. Torres heard shots and saw Anthony fall to the ground. He himself was shot in the neck, but he did not see who shot him.

Deputy Sheriff Woodrow West went to Belvedere Park around 4 a.m. to investigate the shootings. He found a small pocket knife on the ground near the spot where Anthony Aceves had fallen. There were traces of blood on the knife. Deputy West also found five expended .22-caliber bullet casings.

Autopsies performed on the bodies of Gilbert Martinez and Anthony Aceves revealed that both alcohol (.09 percent) and PCP (.033 micrograms per milliliter) were found in Martinez's blood and that PCP (.042 micrograms per milliliter) was detected in Aceves's liver tissue. Since Aceves died three days after the shooting, the PCP levels in his liver and blood would have been higher at the time of the shooting.

2. *Wells Murders.*

Benjamin Verduzco had known defendant for about 16 years and had been a fellow member of Arizona Marivilla, but Verduzco no longer belonged. He agreed to testify in exchange for release from prison. He was placed in a protection program, given $600 a month for room and board, and was promised a name change.

On October 15 or 16, 1984, defendant asked Verduzco to keep a beige and brown Monte Carlo in his garage because he was in some kind of trouble.

Verduzco agreed. Defendant left the car in Verduzco's garage and drove off with Eugene Valenzuela in a 1969 black Chevrolet Impala.

A week later, on October 24, 1984, defendant came to Verduzco's home. Ray and Marlene Wells arrived a few minutes later. Defendant asked to borrow $5 from Ray Wells and then left. That night, the police came to Verduzco's house and seized defendant's car.

On October 31, 1984, at 12:42 a.m., Frank Bender heard gunshots. He went to the front door of his house and looked across the street to the residence of Ray and Marlene Wells. He noticed that the Wellses' dog appeared frightened. He also saw a black 1968 Chevrolet Caprice parked nearby with the engine running.[2] Shortly thereafter, he saw a silhouette cross the Wells yard and drive away in the car.

That same night, between 1 and 2 a.m., defendant called Benjamin Verduzco and said, "Bennie, I just did the big mouth in." When Verduzco asked, "Who," defendant said, "Remember the one who was there in the morning with the car." He referred to him as "R" and did not use a name. Defendant also said, "You know I take care of business. I had to do her, too." Defendant killed "her" because she saw him "do R." Defendant said, "They have gone to heaven with the angels." Defendant said he did it so that "they wouldn't be snitching no more."

Deputy Sheriff Robert Havercroft went to the Wells residence on the night of the murders. The rear door of the house was closed but not locked. He found Ray Wells's body on a couch in the living room and Marlene's body in the doorway between the dining room and kitchen. Deputy Havercroft found no evidence of theft, and no signs of forced entry.

Deputy Havercroft found three appointment books with many names and addresses. Attached to one of the appointment books were two small pieces of paper. The names "Chato" and "Pelon" were written on one piece of paper, and the name "Moses Verduzco" was written on the other.

Betty Phipps sold a 1968 Chevrolet Caprice to defendant in October 1984. The car was not in running condition; defendant told her he was going to fix it up. On October 7, 1984, a black 1968 Chevrolet Caprice was stolen from the Los Angeles zoo. The stolen 1968 Chevrolet Caprice was stopped at the

[2]Bender, who is a car buff, first told police it was a Chevrolet Impala. He determined it was a Chevrolet Caprice after examining a book of cars. The only difference between an Impala and a Caprice was that the Caprice had chrome strips. He remembered the car because it was in excellent shape.

United States-Mexico border at Tecate on December 15, 1984, while Salvador Rubio, a member of the Arizona Marivilla gang, was driving it. The license plate and vehicle identification numbers that were on the car did not belong to the car. One of the documents found in the glove compartment was a "pink slip" or ownership certificate with the name of Betty Phipps on the back.

Defense Case

1. *Belvedere Park Murders.*

The defense presented evidence from law enforcement officers and others regarding inconsistent statements given by Adela Rodriguez and the other young women on the night of the shootings. Zebba Rodriguez testified that when she was walking back to the car she saw Gilbert Martinez, Anthony Aceves, and Manuel Torres arguing with about three other men. She was afraid, got in the car, heard shots, and ducked until she heard no more shots. When she raised her head, she saw Gilbert and Anthony lying on the ground. She did not see who had done the shooting.

David Martinez testified that he went to Belvedere Park on the night of the shooting with Carlos Tostado. He and Tostado had spent the day cruising, drinking beer and smoking PCP.

Dr. Griffith Thomas, a pathologist, testified that PCP can cause very bizarre and aggressive behavior. The amount of PCP in the victims' bodies would correlate with bizarre behavior. Dr. Donald Trockman, a forensic psychiatrist, testified that persons with amounts of PCP in their systems such as the victims showed were "unpredictable people" and that they "may attack you and try to kill you."

2. *Wells Murders.*

Detective Gene Hetzel interviewed Benjamin Verduzco on November 1, 1984. When he told Verduzco that the Wellses had been murdered, Verduzco appeared surprised and shocked. Verduzco did not mention that he had received a phone call from defendant on the night of the murders. He did not tell police about the phone call until much later.

Ralph Ortega testified that he went to a ranch in Tecate, Mexico with defendant and several other people on October 24, 1984. Ortega went back to Los Angeles and returned to Tecate with his wife and children on October 30, 1984. Defendant was still there. The next evening, October 31, Halloween, defendant and some others took Ortega's son trick-or-treating.

GUILT PHASE CONTENTIONS

1. *Denial of Motion to Sever Counts.*

Defendant contends that the trial court erred in denying his motion to sever the Belvedere Park murders from the Wells murders. He argued for severance on the basis that the incidents were unrelated, not cross-admissible, and that the evidence in the Wells charges was far weaker than that in the Belvedere Park charges. The court denied severance based on the prosecutor's representation that Benjamin Verduzco would testify at trial and provide evidence of defendant's motive and premeditation concerning the Wells murders that linked them with the Belvedere Park murders.

Defendant renewed his motion to sever shortly before trial was scheduled to begin. The trial court denied the motion, again in reliance on the prosecutor's representation about Verduzco's anticipated testimony.

Section 954 provides in pertinent part: "An accusatory pleading may charge two or more different offenses . . . of the same class of crimes or offenses, under separate counts . . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. . . ."

The statutory requirements for joinder were met here because both incidents involved the same class of crimes—murder. (1) Since the requirements for joinder were satisfied, defendant can predicate error only on a clear showing of potential prejudice. (*People* v. *Johnson* (1988) 47 Cal.3d 576, 587 [253 Cal.Rptr. 710, 764 P.2d 1087].) "The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (*People* v. *Bean* (1988) 46 Cal.3d 919, 938 [251 Cal.Rptr. 467, 760 P.2d 996].)

"The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial." (*Frank* v. *Superior Court* (1989) 48 Cal.3d 632, 639 [257 Cal.Rptr. 550, 770 P.2d 1119].) Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate

evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns it into a capital case. (*Ibid.*; see also *Williams* v. *Superior Court* (1984) 36 Cal.3d 441, 453 [204 Cal.Rptr. 700, 683 P.2d 699].)

(2) Defendant bases his argument for prejudice primarily on the absence of cross-admissibility of the two sets of offenses. He argues that the trial court's reasoning did not establish that the evidence of the two separate incidents would have been admissible in its entirety had there been separate trials. According to defendant, all it established was that there would have been some minor evidentiary crossover as to the two incidents. However, even if defendant is correct on this point, it is now clear that cross-admissibility is not the sine qua non of joint trials. (*People* v. *Mason* (1991) 52 Cal.3d 909, 934 [277 Cal.Rptr. 166, 802 P.2d 950]; *Frank* v. *Superior Court*, *supra*, 48 Cal.3d at p. 641; *People* v. *Poggi* (1988) 45 Cal.3d 306, 321 [246 Cal.Rptr. 886, 753 P.2d 1082].) "While we have held that cross-admissibility ordinarily dispels any inference of prejudice, we have never held that the absence of cross-admissibility, by itself, sufficed to demonstrate prejudice." (*People* v. *Mason*, *supra*, 52 Cal.3d at p. 934.) "That the evidence would otherwise be inadmissible may be considered as a factor suggesting possible prejudice, but countervailing considerations that are not present when evidence of uncharged offenses is offered must be weighed in ruling on a severance motion. The burden is on the defendant therefore to persuade the court that these countervailing considerations are outweighed by a substantial danger of undue prejudice." (*People* v. *Bean*, *supra*, 46 Cal.3d at p. 939.)

Defendant did not carry that burden. The potential prejudice he asserted did not rise to the level of demonstrating that the court's denial of severance was an abuse of discretion. The court recognized that the anticipated testimony by Verduzco added significantly to the strength of the Wells case, thereby obviating the danger of a "spillover" effect from the Belvedere Park evidence. Indeed, the court suggested that it would reconsider the severance motion if the prosecution were not able to secure Verduzco's testimony. The inflammatory effect of defendant's gang membership as to the Belvedere Park case was neutralized by the fact that the victims were also gang members. Moreover, this was not a case in which capital charges resulted solely from the joinder of the two incidents. (Cf. *Williams* v. *Superior Court*, *supra*, 36 Cal.3d at p. 454.)

Defendant also made passing reference to the fact that he had separate defenses that would be prejudiced because he desired to testify as to one

incident but not the other. Although we have not addressed this theory of prejudice, it has been considered by federal courts. The federal courts have ruled that severance is not mandatory every time a defendant wishes to testify to one charge but not to another. " 'If that were the law, a court would be divested of all control over the matter of severance and the choice would be entrusted to the defendant.' " (*U.S.* v. *Archer* (7th Cir. 1988) 843 F.2d 1019, 1022.) The need for severance does not arise in federal courts " 'until the defendant makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other.' " (*Ibid.*; quoting *Baker* v. *United States* (D.C. Cir. (1968) 401 F.2d 958, 977 [131 App.D.C. 7]; see also *United States* v. *Valentine* (10th Cir. 1983) 706 F.2d 282, 291.) Federal courts have required the defendant to present enough information to satisfy the court that the claim of prejudice is genuine and to enable it to weigh the considerations of economy and expedient judicial administration against the defendant's interest in having a free choice with respect to testifying. (*United States* v. *Valentine*, *supra*, 706 F.2d at p. 291.)

Defendant's showing fell far short of anything that would have satisfied the federal standards or any standard this court might adopt. Defendant neither explained the nature of the testimony he wished to give in the Belvedere Park case nor his reasons for not wanting to testify in the Wells case. The trial court did not abuse its discretion in denying severance.

(3) Because the issue is raised on appeal following trial, we must also consider whether, "despite the correctness of the trial court's ruling, a gross unfairness has occurred from the joinder such as to deprive the defendant of a fair trial or due process of law." (*People* v. *Johnson*, *supra*, 47 Cal.3d at p. 590.) Defendant claims gross unfairness occurred as a result of the destruction of his ability to testify as to one incident but not as to the other. He has done no more, however, than make a bald assertion to that effect. "One asserting prejudice has the burden of proving it; a bald assertion of prejudice is not sufficient." (*Id.* at p. 591.) We conclude, therefore, that defendant has failed to show that denial of severance deprived him of a fair trial.

2. *Use of Peremptory Challenges.*

Defendant contends that the trial court erred in permitting the prosecutor to systematically exercise his peremptory challenges to excuse from the jury those prospective jurors who had expressed some scruples about imposition of the death penalty. Defendant acknowledges that we have addressed this contention on numerous occasions and have found no constitutional infirmity in permitting peremptory challenges by both sides on the basis of

specific juror attitudes on the death penalty. (See, e.g., *People* v. *Caro* (1988) 46 Cal.3d 1035, 1061 [251 Cal.Rptr. 757, 761 P.2d 680]; *People* v. *Belmontes* (1988) 45 Cal.3d 744, 799 [248 Cal.Rptr. 126, 755 P.2d 310].) Accordingly, we reject defendant's contention.

3. *Evidence of Defendant's Gang Membership.*

Defendant contends that the trial court erred in admitting evidence of his gang membership because it was irrelevant and prejudicial to his defense. Defendant objected pretrial by moving to preclude the prosecutor from referring to his alleged gang membership during opening statements. The prosecutor argued that evidence of gang membership was relevant to prove the motive for the murders at Belvedere Park. The trial court ruled that the prosecutor had made a showing that the evidence was admissible and denied the motion.

Defendant later moved to strike the testimony of Carlos Tostado and Benjamin Verduzco on the ground that the prosecutor had used them to put irrelevant and prejudicial testimony before the jury of defendant's alleged gang membership. The trial court denied the motion, ruling that the gang membership evidence had not caused undue prejudice.

(4) Defendant argues that the evidence of gang member ship was irrelevant and that the prosecutor never proved a gang-related motive for the shootings. We do not agree. The evidence established that the victims were members of a rival gang. The fact that the gangs purportedly had been at peace for seven years does not eliminate gang retaliation as a motive. Indeed, that appears to have been the only plausible motive. What we have here is a battle over turf. The Arizona Marivilla gang considered Belvedere Park to be its territory. The victims, members of a rival gang, were in Arizona Marivilla territory and were shot by a member of the Arizona gang without any other provocation.

Defendant argues that evidence of gang membership was found to be prejudicial and irrelevant in *People* v. *Cardenas* (1982) 31 Cal.3d 897 [184 Cal.Rptr. 165, 647 P.2d 569] and *People* v. *Perez* (1981) 114 Cal.App.3d 470 [170 Cal.Rptr. 619]. However, here, unlike *Cardenas* and *Perez*, the evidence was far more relevant. In *Cardenas* the prosecution introduced evidence of gang membership to prove bias of defense witnesses, but bias had already been established by other testimony. We held that the admission of gang membership evidence was an abuse of discretion under Evidence Code section 352 because the evidence was of minimal probative value, cumulative, and extremely prejudicial. In *Perez*, the evidence of gang membership had no relevance to any issue at trial. In this case, the court did not err in the admission of gang affiliation.

4. *Exclusion of Evidence of Third Party Culpability.*

(5a) Defendant contends that the trial court improperly excluded, pursuant to Evidence Code section 352, evidence of third party culpability as to the Wells murders. We find no abuse of the court's discretion to exclude such evidence.

Deputy Havercroft found a daily appointment book and two weekly planners at the Wells residence. The books contained many names and addresses. Two small pieces of paper were clipped to the daily appointment book. The names "Chato" and "Pelon" were written on one piece of paper, and the name "Moses Verduzco" was written on the other piece of paper. Defendant's nickname is "Chato."

The defense sought to prove that Ray Wells was the center of a violent criminal operation involving drugs and stolen cars and guns, and that any number of criminal accomplices or rivals could have killed him. Therefore, the defense sought to cross-examine Deputy Havercroft about the names found in the appointment book and weekly planners and to introduce those documents into evidence. After considerable argument and an offer of proof, the court ruled that the evidence was inadmissible because "it still does not point the finger at any individual nor does it rise at all above possible ground of suspicion."

(6) A criminal defendant has a right to present evidence of third party culpability if it is capable of raising a reasonable doubt about his own guilt. This rule does "not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People* v. *Hall* (1986) 41 Cal.3d 826, 833 [226 Cal.Rptr. 112, 718 P.2d 99].)

(5b) The trial court properly found defendant's showing insufficient. The defense had no evidence of another person's actual motive to commit the crimes. Instead, the defense merely raised the possibility that others had a motive to kill Ray and Marlene Wells. Although the defense identified two persons with plausible motives, they had no direct or circumstantial evidence linking them to actual perpetration of the crimes.

The present case is similar to *People* v. *Edelbacher* (1989) 47 Cal.3d 983, 1017-1018 [254 Cal.Rptr. 586, 766 P.2d 1], where the defense sought to

introduce evidence concerning the victim's association with "Hell's Angel-type people" and drug dealers in order to prove that someone other than the defendant committed the crime. We affirmed the trial court's ruling that the evidence was inadmissible. It did not identify a possible suspect other than the defendant or link any third person to commission of the crime, or even establish an actual motive rather than a possible or potential motive.

Defendant's reliance on *Crane* v. *Kentucky* (1986) 476 U.S. 683 [90 L.Ed.2d 636, 106 S.Ct. 2142] is misplaced. That case bears no similarity to the facts of the present case. *Crane* involved the exclusion of testimony regarding the circumstances surrounding the taking of the defendant's confession. The Supreme Court held that the ruling had denied the defendant a fair opportunity to present a defense.

(7) As an additional basis for admission of this evidence defendant argues that the evidence was admissible pursuant to Evidence Code section 356. That argument is also unavailing. Evidence Code section 356 provides in pertinent part: "Where part of an act, declaration, conversation, or writing is given in evidence . . . any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

Contrary to defendant's contention, Evidence Code section 356 did not require admission of the appointment book and weekly planners. Those books simply were not part of a writing given in evidence by the prosecution. While the prosecution introduced independent slips of paper that were clipped to the appointment book, the book and the weekly planners themselves were unnecessary to an understanding of the slips of paper.

5. *Admissibility of Prior Conviction for Impeachment.*

(8) Defendant contends that the trial court erred in ruling that his prior conviction for assault with intent to commit murder would be admissible for impeachment purposes. We do not agree. The court followed the analysis set forth in *People* v. *Castro* (1985) 38 Cal.3d 301 [211 Cal.Rptr. 719, 696 P.2d 111], interpreting article I, section 28, subdivision (f) of the California Constitution, which was enacted as part of Proposition 8 in 1982. It properly concluded that defendant's reliance on pre-*Castro* cases was not determinative and that defendant's conviction for assault with intent to commit murder involved moral turpitude. (*People* v. *Olmedo* (1985) 167 Cal.App.3d 1085, 1097-1098 [213 Cal.Rptr. 742].) The court then exercised its discretion under Evidence Code section 352, concluding that the probative value outweighed the prejudicial effect. The court noted that it could not assess the

impact of the prior conviction on defendant's testimony because no offer of proof as to that testimony had been made. Contrary to defendant's contention, the court did not state that an offer of proof was required and, indeed, noted that California law did not then require an offer of proof.[3] Because of the similarity of the prior to one of the charged crimes, the court offered to sanitize the prior by allowing reference to the conviction only as a prior felony conviction. It did not abuse its discretion in doing so. (See *People* v. *Massey* (1987) 192 Cal.App.3d 819, 825 [237 Cal.Rptr. 734].)

Defendant's reliance on pre-*Castro* and Proposition 8 cases is unpersuasive. (9) As we noted in *People* v. *Castro*, *supra*, 38 Cal.3d at page 312, the intention of the drafters of Proposition 8 was to "restore trial court discretion as visualized by the Evidence Code and to reject the rigid, black letter rules of exclusion" which had been grafted onto the code by our decisions. Accordingly, we find no abuse of discretion in the trial court's ruling.

6. *Request for Ruling in Advance on Scope of Cross-examination of Defendant.*

(10) Defendant contends that the trial court's refusal to rule on the scope of permissible cross-examination if he took the witness stand to testify on the Belvedere Park murders violated his right to testify on his own behalf.

Before the defense rested its case, defense counsel told the court that defendant wished to testify about the Belvedere Park incident on October 14, 1984, but that he did not wish to testify about the Wells murders on October 31, 1984. Counsel asked the court to limit any cross-examination of defendant to the Belvedere Park charges. Counsel indicated that defendant would testify on the issue of self-defense but gave no further details as an offer of proof. Defense counsel argued that the two incidents were entirely separate and that the direct and cross-examination could therefore be limited to the Belvedere Park charges. The prosecution disagreed, asserting that there was evidentiary spillover regarding defendant's efforts to hide the beige and brown Monte Carlo in Verduzco's garage and Ray Wells's apparent knowledge of the transaction. The trial court refused to make a ruling in advance of defendant's actual testimony, stating "whether a defendant can effectively limit the cross-examination depends upon the direct examination and may not be known until he testifies. The law is that a defendant cannot artificially limit the cross-examination and direct examination."

[3]We have since held that testimony by the defendant is a prerequisite to appellate review. (*People* v. *Collins* (1986) 42 Cal.3d 378, 383 [228 Cal.Rptr. 899, 722 P.2d 173].) The ruling here preceded our holding in *Collins*, which was to be applied prospectively only.

Defendant has failed to show that the court's ruling was erroneous. None of the authorities cited is directly on point, and none would have required the ruling sought here. Indeed, there is authority supportive of the trial court's action. (See *People* v. *Keenan* (1988) 46 Cal.3d 478, 410-513 [250 Cal.Rptr. 550, 758 P.2d 1081]; *People* v. *Williams* (1988) 44 Cal.3d 883, 912-913 [245 Cal.Rptr. 336, 751 P.2d 395].) The court acted well within its discretion.

7. *Cross-examination of Dr. Trockman.*

Dr. Donald Trockman, a forensic psychiatrist, testified as an expert witness for the defense in support of the self-defense claim as to the Belvedere Park counts. Dr. Trockman testified that there was a high correlation between ingestion of PCP and unpredictable violence and hostility. Based on his review of the autopsy report of Gilbert Martinez showing bruises and high levels of PCP and alcohol in his blood, Dr. Trockman concluded that at the time of his death, Martinez was in an angry, aggressive, violent mood. He could not reach any specific conclusion as to the mood of Anthony Aceves because he had lived for three days after the shooting.

On cross-examination Dr. Trockman testified that the mental state reached under the influence of alcohol is different from the mental state reached under the influence of PCP. The prosecutor reminded the doctor that he had testified differently in previous cases where the person was charged with being under the influence of PCP and asked the doctor whether his answer was dependent on his function in the particular case.

The prosecutor asked Dr. Trockman if Gilbert Martinez was in a violently aggressive mood during his entire period of PCP intoxication, and was told: "The important time. The time when he confronted the accused in this case." The prosecutor then asked how he knew the victim had confronted the accused and whether the defense had told him what he had to accomplish to dispel the prosecution case.

The prosecutor also asked Dr. Trockman whether, by his testimony, he tries to affect the outcome of a case. The prosecutor queried whether the witness instructed attorneys on the questions they should ask for dramatic effect, to maintain the interest of the jury, and to dispel inferences of defense bias.

During closing argument the prosecutor referred to the doctor's admission that he had testified differently in other cases about the distinction between alcohol and PCP intoxication. Based on the admission the prosecutor stated that the doctor "is a liar."

(11) Defendant contends that the prosecutor committed prejudicial misconduct in so questioning the doctor and in calling him a liar during closing argument. Although defendant objected to the questions on cross-examination, he raised no objection during argument to the prosecutor's use of the term "liar." Defendant has thus waived the latter point since any harm caused by this characterization could have been cured by a timely objection and an admonition. (*People* v. *Green* (1980) 27 Cal.3d 1, 27 [164 Cal.Rptr. 1, 609 P.2d 468].)

In any event, there was no prosecutorial misconduct. The prosecutor was entitled to question the doctor's testimonial consistency and possible bias. (*People* v. *Meneley* (1972) 29 Cal.App.3d 41, 60 [105 Cal.Rptr. 432].) Referring to testimony as "lies" is an acceptable practice so long as the prosecutor argues inferences based on the evidence and not on the prosecutor's personal belief. (*People* v. *Edelbacher*, *supra*, 47 Cal.3d 983, 1030.) Closing argument may be vigorous and may include opprobrious epithets when they are reasonably warranted by the evidence. In this case, the prosecutor's argument was based on the evidence and amounted to nothing more than vigorous yet fair argument. (*Ibid.*)

Defendant's reliance on *People* v. *McGreen* (1980) 107 Cal.App.3d 504 [166 Cal.Rptr. 360] (overruled on other grounds in *People* v. *Wolcott* (1983) 34 Cal.3d 92 [192 Cal.Rptr. 748, 665 P.2d 520]) is misplaced. In *McGreen*, the prosecutor attempted to discredit the expert witness by showing that he had received B and C grades in graduate school and that the witness's membership in certain scientific societies was a sham. The trial court eventually foreclosed further cross-examination on these grounds. The prosecutor nevertheless persisted in the line of questioning and additionally asserted that the witness's testimony had been stricken in another case because it was "patently unbelievable." When asked for authority to support the admission of such evidence of the witness's "unbelievability," the prosecutor admitted he had none. Additionally, during argument the prosecutor suggested there had been an ethics investigation of the witness and characterized the witness as an habitual liar who prostituted his credentials for $50 an hour. (*Id.* at pp. 514-517.)

In no way was the cross-examination in this case comparable to that in *McGreen*. Here, the prosecutor elicited testimony tending to show bias by questioning the witness about his contrary testimony in previous cases and his interest in helping the defense. Such cross-examination was proper. (See *People* v. *Rich* (1988) 45 Cal.3d 1036, 1088 [248 Cal.Rptr. 510, 755 P.2d 960].)

8. *Cross-examination of Ralph Ortega.*

Defendant contends the prosecutor committed multiple instances of prejudicial misconduct during the cross-examination of Ralph Ortega, defendant's alibi witness in the Wells case.

Ralph Ortega testified for the defense that he went with defendant, Eugene Valenzuela, and others to a small ranch in Tecate, Mexico on October 24, 1984. He testified further that he stayed four days and returned to Los Angeles while defendant remained at the ranch. Defendant was still there when Ortega returned around midnight on October 30. They stayed on at the ranch; defendant went with Ortega the next night, Halloween eve, to take Ortega's son trick-or-treating.

On cross-examination the prosecutor elicited from Ortega that he had been arrested about 5:45 a.m. on October 24, 1984, near the Mexican border. He established that Ortega was not released from custody until about 5 p.m. that evening. The prosecutor noted that this information had not been revealed during Ortega's testimony on direct examination and asked Ortega if defense counsel had tried to avoid this subject. The prosecutor made references to Ortega's decision to "fess up" because "I was on to you" and asked if defense counsel had explained to him that it was necessary to put defendant in Tecate around 10 or 11 a.m. on October 24. The prosecutor established that Ortega and his friends just "hung around" the ranch. The prosecutor also established that Ortega purchased and delivered food and supplies to defendant and Valenzuela during their entire stay in Tecate.

The prosecutor asked Ortega if counsel had explained to him that he would be liable as an accessory after the fact if he ever admitted that he knew that defendant had committed the Belvedere Park murders at the time he took defendant to Tecate. Ortega said no and denied any knowledge that defendant was involved.

Later, when questioning Ortega about his knowledge of the seizure of the 1968 Chevrolet Caprice at the border, the prosecutor stated: "Are you going to stop your lying here in court?" Defense counsel objected to the prosecutor's yelling, but not to the question itself.

(12) Defendant contends that the prosecutor committed misconduct by repeatedly suggesting that defense counsel had colluded with Ortega in the fabrication of Ortega's alibi testimony. In our view, the record, as described above, does not support the assertion. Moreover, defendant has waived the point by failing to object and request a timely admonition. (*People* v. *Green*, *supra*, 27 Cal.3d at p. 27.)

(13) Defendant also claims that the prosecutor used his cross-examination of Ortega to express his own personal disbelief in Ortega's testimony. Defendant refers to the questions suggesting that Ortega was lying. Again, no objection was raised below, and the point is therefore waived since any harm could have been cured by a prompt admonition. (*People* v. *Green*, *supra*, 27 Cal.3d at p. 28.)

(14) Defendant asserts that the prosecutor improperly tried to impeach Ortega with evidence of a drug arrest. Ortega was arrested as an accessory to murder in this case, but he was released from custody after one day and charges were never filed. When questioning Ortega about his arrest in this case, the prosecutor queried, "You were also arrested for something else, weren't you?" Defense counsel's objection was *sustained*. No admonition was requested or given. Under these circumstances, we fail to see how defendant could have been prejudiced by this question since the jury was already aware that Ortega had been arrested on the way to Tecate for possession of methamphetamines. Moreover, the jury was given the standard instruction (CALJIC No. 1.02) stating that a question is not evidence and that they should not guess what the answer might have been when an objection is sustained.

(15) Defendant also contends that the prosecutor improperly questioned Ortega about his failure to volunteer his exculpatory information to the police prior to trial. Defendant asserts that the prosecutor was aware that Ortega had been arrested as an accessory and had exercised his constitutional right to remain silent. Indeed, Ortega explained that he had never told the police about the alibi because he had refused to be interviewed. On redirect Ortega explained that he had given his exculpatory information to the defense attorneys and their investigator a year before the trial. Therefore, even assuming that the prosecutor's questioning in this area amounted to misconduct, we conclude that defendant suffered no significant prejudice as a result of it.

(16) Defendant complains about questions concerning remarks made in the elevator after Ortega's testimony on direct examination. The prosecutor, defense counsel, and Ortega had a conversation in the elevator as they left the courthouse. No jurors were present in the elevator. The following morning, defense counsel reopened direct examination and questioned Ortega about the conversation in the elevator. Ortega testified that the prosecutor threatened him and said "someone is going to jail behind this."

On cross-examination the prosecutor asked Ortega whether he (the prosecutor) had made the alleged threat in response to a question asked by

defense counsel. When Ortega answered yes, the prosecutor asked if defense counsel had said "Well, how do you guys like what happened in there today?" Defense counsel objected and denied making the statement. The objection was overruled. Ortega responded that he had heard defense counsel say only, "What's up?"

Defendant argues that the prosecutor's question was asked in bad faith. The claim is supported by nothing more than defendant's bald assertion. No police officers who overheard the conversation were called as witnesses by either the prosecution or the defense. Since the record contains no basis for branding the prosecutor's questioning as bad faith, we reject defendant's contention.

9. *Prosecutor's Argument.*

Defendant contends that the prosecutor committed prejudicial misconduct in a number of respects in addition to the claims that we have already discussed. (17a) First, defendant charges the prosecutor with improper attacks on defense counsel. During the course of his lengthy review of the testimony of virtually every witness, the prosecutor referred to attempts by defense counsel to mislead the jury and, at one point, accused defense counsel of perpetrating a fraud on the court. The prosecutor also referred to defense theories and evidence as "ridiculous" and "nonsense." Defendant interprets the prosecutor's characterization of the defense testimony as lies and concoctions, to be an accusation of defense fabrication of evidence. Defendant also complains about the prosecutor's repeated references to defense counsel's reaction to particular testimony.

(18) "A prosecutor may vigorously argue his case, marshalling the facts and arguing inferences to be drawn therefrom. (*People* v. *Fosselman* (1983) 33 Cal.3d 572, 580 [189 Cal.Rptr. 855, 659 P.2d 1144].) We have held he may not express a personal belief in defendant's guilt, in part because of the danger that jurors may assume there is other evidence at his command on which he bases this conclusion. (*People* v. *Bain* (1971) 5 Cal.3d 839, 848 [97 Cal.Rptr. 684, 489 P.2d 564].) We have also held it improper for the prosecutor to imply that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case. It is not necessary to find that such implication impinges upon defendant's constitutional right to counsel. (Compare *People* v. *Turner* (1983) 145 Cal.App.3d 658, 674 [193 Cal.Rptr. 614].) Instead it is sufficient to note that defendant's conviction should rest on the evidence, not on derelictions of his counsel. (*People* v. *Perry* (1972) 7 Cal.3d 756, 790 [103 Cal.Rptr. 161, 499 P.2d 129]; *Bain*, *supra*, 5 Cal.3d at p. 847.) Casting uncalled for aspersions on defense

counsel directs attention to largely irrelevant matters and does not constitute comment on the evidence or argument as to inferences to be drawn therefrom." (*People* v. *Thompson* (1988) 45 Cal.3d 86, 112 [246 Cal.Rptr. 245, 753 P.2d 37].)

(17b) Defendant objected to many, but not all, of the cited instances. For the most part, his objections were overruled. The court did, however, sustain his objection to the accusation of perpetrating a fraud on the court. It admonished the jury to disregard the comment, stating that there had been no perpetration of a fraud by any lawyer in this case. While we agree that many of the cited remarks were improper, we do not find them to have been prejudicial. The prosecutor was entitled to argue the inconsistencies in the evidence and even to characterize inconsistent testimony as "lies." (See *People* v. *Edelbacher*, *supra*, 47 Cal.3d at p. 1030.) Here, however, the prosecutor went beyond that point on several occasions, denigrating counsel instead of the evidence. Personal attacks on opposing counsel are improper and irrelevant to the issues. The prosecutor's reference to counsel's reaction to particular evidence was also improper for the same reason, but we do not interpret it as a charge of fabrication of evidence. All of these remarks were a small part of the prosecutor's very lengthy review of the evidence presented. They were clearly recognizable as an advocate's hyperbole. (See *People* v. *Poggi*, *supra*, 45 Cal.3d at p. 340.) Accordingly, we find no reasonable probability that the jury would have reached a more favorable result absent the objectionable comments. (*People* v. *Green*, *supra*, 27 Cal.3d at p. 36.)

(19) Defendant also contends that the prosecutor committed misconduct because he expressed personal opinions regarding the defense case. Defendant refers to the prosecutor's statement that "I shake my head in disbelief every time I think about it [Ralph Ortega's testimony]." Defendant also makes reference to the prosecutor's statement: "They know the defendant killed those boys. And they know he killed Ray and Marlene Wells." Finally, defendant complains about the prosecutor's argument about the disparities between defense promises of proof in the opening statement and the trial evidence. Defendant waived all but the first point by failing to raise a timely objection at trial. (*People* v. *Green*, *supra*, 27 Cal.3d at p. 27.) As to the first point, the remark was made in the context of reviewing the discrepancies in defense testimony and was not likely to be understood as being based on anything outside the record.

(20) Defendant further charges that the prosecutor committed misconduct by referring to defendant's failure to testify at trial. The prosecutor argued that he forestalled defense testimony by preemptively proving that

defendant did not need glasses at the time of the Belvedere Park offenses: "I should not have proved to you earlier in the trial that he didn't need glasses at the time in the park, because then you would have heard, 'Well, I was in the park, and you can see all the witnesses say I didn't have any glasses on. And I saw one guy go do my friend in with a knife. And another one came to me, and I thought he was going to do me in. I ran over to help my friend and shot him, and I shot him twice. I saw the other one. I couldn't see good who was doing what to me, so I shot him. And the other one coming at me, I shot him, too, because I just couldn't see good.' That's what you would have heard." A defense objection under *Griffin* v. *California* (1965) 380 U.S. 609 [14 L.Ed.2d 106, 85 S.Ct. 1229] (*Griffin*) was sustained, and the court admonished the jury to disregard the prosecutor's comments to the extent they reflected on the defendant's not testifying. The prosecutor referred to the glasses again in his rebuttal, stating: "And I argued in my opening argument the fact that you would hear or you would have heard, had we given them a little rope to hang themselves, also you would have heard, 'Well, I couldn't see. I didn't have my glasses on, so therefore that's why I shot this person and I had to shoot this person.'" The defense objection was overruled.

We believe that the court's initial admonition was sufficient to obviate any *Griffin* concern. To the extent that the rebuttal comment could be construed as a reference to defendant's failure to testify, in context, it was clearly harmless. The reference was a minor feature in this seemingly marathon argument.

(21) Defendant contends that the prosecutor committed misconduct by referring to defendant's courtroom appearance (wearing a suit, wearing reading glasses, being clean-shaven) as a "ploy" and by asserting that defendant did not need to wear the glasses all the time during the trial. Defendant waived these points by failing to object at trial, since any harm could have been cured by timely objection and prompt admonition. (*People* v. *Green*, *supra*, 27 Cal.3d at p. 27.) In any event, these statements could not have had a prejudicial effect in light of the overwhelming evidence of the Belvedere Park killings.

In sum, we find no denial of due process or a fair trial as a result of any misconduct committed by the prosecutor. Both sides seemed unduly argumentative and personal on occasion, but such instances were not so frequent or severe as to detract from the jury's fair consideration of the evidence.

10. *Instruction on Reasonable Doubt*

In a supplemental brief, defendant argues that the instruction on reasonable doubt, CALJIC No. 2.90, is constitutionally flawed, citing *Cage* v.

Louisiana (1990) 498 U.S. __[112 L.Ed.2d 339, 111 S.Ct. 328]. Similar challenges to CALJIC No. 2.90 were raised and rejected in *People* v. *Jennings* (1991) 53 Cal.3d 334, 385-386 [279 Cal.Rptr. 780, 807 P.2d 1009] and *People* v. *Johnson* (1992) 3 Cal.4th 1183, 1234-1235 [__Cal.Rptr.2d __, __P.2d __]. As we noted in *Jennings* and *Johnson*, despite use of the term "moral certainty" in CALJIC No. 2.90, the instruction does not suffer from the flaws condemned in *Cage* v. *Louisiana*, *supra*, 498 U.S. __[112 L.Ed.2d 339, 111 S.Ct. 328].

Defendant also cites Justice Mosk's criticism of CALJIC No. 2.90 in his concurring opinion in *People* v. *Brigham* (1979) 25 Cal.3d 283, 292-316 [157 Cal.Rptr. 905, 599 P.2d 100]. Recognizing that CALJIC No. 2.90 is a verbatim copy of section 1096, Justice Mosk urged the Legislature to redraft the definition of reasonable doubt in section 1096 to make it intelligible to modern juries. The Legislature has not responded. As Justice Mosk recognized, such changes must come from the Legislature.

PENALTY PHASE FACTS

Evidence in Aggravation.

The penalty case-in-aggravation consisted of evidence of three prior crimes by defendant: 1) a 1978 assault upon a police officer; 2) a 1979 conviction of assault with intent to commit murder; and 3) a 1985 assault on a fellow jail inmate.

1. *1978 Assault.*

Deputy Sheriff Randall Prestwich testified that on May 13, 1978, he and his partner heard gunshots in the vicinity of Arizona Street in Los Angeles. They saw defendant and two other men run from a house. Defendant had a shotgun. Deputy Prestwich yelled at the men to freeze. The other two ran off, and defendant brought the gun up to his waist and flinched, as if he expected the gun to go off. Deputy Prestwich fired a shot at defendant and saw defendant flinch again. Defendant turned and ran. Deputy Prestwich caught him and arrested him for assault on a police officer.

2. *1979 Assault.*

Ernest Leos testified that on March 17, 1979, he and his son were in their driveway when Jesse Trujillo's car stopped in front of the driveway. Leos's son, Ernest, Jr., went over to the car and was shot while talking to someone in the car. Defendant was convicted of assault with intent to commit murder for this shooting.

3. *1985 Assault.*

Deputy Sheriff Kenneth Salazar testified that on March 21, 1985, defendant was working as a trusty in the high security section of Los Angeles County jail. After defendant had finished passing out and collecting breakfast trays, he was ordered back to his cell so that Guy Walker could leave his cell to take a shower. Walker received a razor blade and soap and went into the shower. Defendant was then released from his cell to complete his duties.

Deputy Lujan saw defendant run into the shower area, approach Walker, and move his fist toward Walker's head. Deputy Salazar saw defendant run from the shower area to the toilet area. As he followed defendant, Deputy Salazar saw Guy Walker slumped on the floor with blood on his face. Deputy Salazar heard a toilet flush. When he reached the toilet area, defendant was standing over a toilet. Deputy Salazar found a small piece of razor in the doorway leading to the toilet area. Walker's injuries could have been caused by a razor blade.

Evidence in Mitigation

1. *Walker Incident.*

Guy Walker testified for defendant. He and defendant had several arguments in March 1985 because defendant had been named trusty and had the cell Walker wanted. Walker tried to cut defendant's throat and to stab him. That same week, defendant entered the shower area and they fought.

2. *In-custody Behavior.*

Deputy Sheriffs Ronald Hernandez and Anthony Campbell, assigned to the Los Angeles County jail, had never had problems with defendant. Defendant was helpful and friendly, and both deputies voted for him to be appointed a jail trusty.

3. *Defendant's Family and Friends.*

Patricia Solis struck up a friendship with defendant after she had been dismissed as a prospective juror in the case. She described defendant as an intelligent and sensitive person, who cared about other people, and loved his children.

Edward Dominguez had known defendant since 1976, when he opened his liquor store in the neighborhood. Defendant was always a gentleman and, on one occasion, prevented a fight in the store.

Richard Rodriguez, a gang consultant affiliated with the California Youth Authority, testified that although Arizona Marivilla was once a street gang, since 1982 it had been incorporated as a neighborhood association. Defendant participated in the youth program when he was released from prison in May 1984.

Defendant's wife and son described him as a nice, lovable man who is a good father.

Defendant's mother, Elizabeth Luna, testified that defendant's father, who had been abusive to her and the children, died when defendant was six or seven. Luna then "went wild," and began drinking and partying. Defendant became "the man of the house" upon his father's death, and he took care of his four brothers and sisters, even stealing on occasion so they could eat.

PENALTY PHASE CONTENTIONS

1. *Evidence of Gang Affiliation.*

(22) Defendant contends that the erroneous admission of his gang affiliation in the guilt phase prejudiced him in the penalty phase because he had to call Richard Rodriguez to rebut that evidence and the prosecutor improperly cross-examined him.

As previously noted, Richard Rodriguez testified in mitigation that the Arizona Marivilla gang, which had been violent, was reformulated in 1982 as a neighborhood association with the goal of keeping the peace. He testified that after defendant left prison in 1984 he was not involved in gang activities and that defendant was working to keep young people out of gangs. On cross-examination the prosecutor asked Rodriguez if it was true that Arizona Marivilla was one of the most violent gangs in East Los Angeles and responsible for most of the murders in that area from 1975 to 1985. The prosecutor also asked if defendant was one of the most active members.

We find no error. First, we have already concluded that the evidence of defendant's gang membership was properly admitted at the guilt phase. Second, the prosecutor was entitled to attempt to negate the evidence in mitigation to the effect that the Arizona Marivilla was now simply a peaceful neighborhood association. (*People* v. *Thompson*, *supra*, 45 Cal.3d at p. 124.) (23) It is well established that the prosecution may inquire of a defense reputation witness whether he has heard of acts or conduct by the defendant inconsistent with the witness's testimony so long as the People have a good faith belief that the acts or conduct about which they wish to

inquire actually took place. (*People* v. *Siripongs* (1988) 45 Cal.3d 548, 578 [247 Cal.Rptr. 729, 754 P.2d 1306].)

2. *Consideration of Defendant's Age.*

(24) Defendant contends that the jury was improperly allowed by the court and prosecutor to consider his age as a factor in aggravation. Defendant was 26 at the time of the offenses. The court rejected defendant's special instruction stating that if defendant's age were to be considered, it could be considered only as a mitigating factor. The court gave CALJIC No. 8.84.1, which permitted the jury to consider "the age of the defendant at the time of the crime" in determining the appropriate penalty.

During the penalty argument, the prosecutor reviewed the factors listed in CALJIC No. 8.84.1 and argued: "The age of the defendant at the time of the crime. He is obviously old enough to know the difference between right and wrong, and that's aggravation."

Defendant acknowledges that we have rejected attacks on the instruction given. (See, e.g., *People* v. *Rodriguez* (1986) 42 Cal.3d 730, 777-779 [230 Cal.Rptr. 667, 726 P.2d 113]; *People* v. *Lucky* (1988) 45 Cal.3d 259, 301-302 [247 Cal.Rptr. 1, 753 P.2d 1052].) As we noted in *People* v. *Lucky*, *supra*, at page 302, mere chronological age should not of itself be deemed either aggravating or mitigating: "In our view, the word 'age' in statutory sentencing factor (i) is used as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue any such age-related inference in every case." (*Ibid.*)

The court did not err in rejecting defendant's proposed special instruction, since it stated that inferences relating to defendant's age could be considered only as a mitigating factor. Nor was there any impropriety in the prosecutor's argument. The prosecutor's argument that defendant was old enough to know better, thus making it aggravating, is an age-related inference that has been found permissible in a number of cases. (See *People* v. *Bonin* (1988) 46 Cal.3d 659, 704-705, fn. 6 [250 Cal.Rptr. 687, 758 P.2d 1217]; *People* v. *Brown* (1988) 46 Cal.3d 432, 456-457 [250 Cal.Rptr. 604, 758 P.2d 1135].)

Defendant urges us to reexamine our construction of the age factor in *People* v. *Lucky*, *supra*, 45 Cal.3d 259 and succeeding cases, arguing that the unfettered discretion regarding how the factor is to be considered renders it unconstitutional under the principles of *Gregg* v. *Georgia* (1976) 428 U.S. 153 [49 L.Ed.2d 859, 96 S.Ct. 2909] and *Maynard* v. *Cartwright* (1988) 486

U.S. 356 [100 L.Ed.2d 372, 108 S.Ct. 1853]. We rejected a similar argument in *People* v. *Babbitt* (1988) 45 Cal.3d 660, 716 [248 Cal.Rptr. 69, 755 P.2d 253] and are not persuaded that we should reexamine that reasoning. (See also *People* v. *Edwards* (1991) 54 Cal.3d 787, 844 [1 Cal.Rptr.2d 696, 819 P.2d 436].)

3. *Reference to Suffering by Victims and Their Families.*

(25) Defendant contends that the prosecutor violated *Booth* v. *Maryland* (1987) 482 U.S. 496 [96 L.Ed.2d 440, 107 S.Ct. 2529] and *South Carolina* v. *Gathers* (1989) 490 U.S. 805 [104 L.Ed.2d 876, 109 S.Ct. 2207] by urging the jury to consider characteristics of the victims and the loss suffered by the victims' families. The allegedly objectionable references were made in response to defense counsel's argument that the jury should consider defendant's difficult childhood, including the fact that he had to become the man of the house at the age of eight, as illustrated by a photograph of defendant at his father's funeral.[4]

The prosecutor stated: "I want you to think about this. I want you to look at this picture very hard. When you have got it back there in that room look at it. How hurtful it was at the time or hurtful it is when you see it years later. But remember the Aceves family. Replace all these faces. Put Anthony Aceves in the casket.

"Put Anthony Aceves in that casket. Put his family around it. Because it happened two years ago they are not victims? They are hurt. He should be given compassion? The way he executed that boy?

"Think about the parents and the family of Gilbert Martinez. When they were standing around his casket and they were crying and they were saying 'My God, how could this happen to my child?'

"Marlene Wells. When she was on the ground and the defendant was standing over her and putting two bullets in the back of her head just before she is looking up at him. 'Don't kill me.' Begging for her life. And he shoots her brutally in the back of the head.

"Think about it. They are funerals. Every time you look at this funeral photograph produced by the defense you think of their funerals. You think of their families. And you are called upon to impose death in cases like this when it's so aggravated. How many people must he kill?"

[4]Defendant's mother testified that defendant was six or seven when his father died. The prosecutor, however, referred to defendant as having been eight at the time of his father's death.

During the pendency of this appeal, both *Booth* v. *Maryland*, *supra*, 482 U.S. 496 and *South Carolina* v. *Gathers*, *supra*, 490 U.S. 805, were largely overruled. In *Payne* v. *Tennessee* (1991) 501 U.S. __[115 L.Ed.2d 720, 111 S.Ct. 2597], the United States Supreme Court held that the use of victim impact evidence does not offend the Eighth Amendment guaranty of an individualized penalty assessment in a capital trial. We have since held that the injury inflicted by the defendant—including evidence about the victim and the impact of the crime on the victim's family—is one of the circumstances of the crime, evidence of which is admissible under section 190.3, factor (a). (*People* v. *Edwards*, *supra*, 54 Cal.3d 787, 833-836; *People* v. *Fierro* (1991) 1 Cal.4th 173, 234-235 [3 Cal.Rptr.2d 426, 821 P.2d 1302].)

The prosecutor's remarks qualified for admission under the principles set forth in *Payne* v. *Tennessee*, *supra*, 501 U.S. __[115 L.Ed.2d 720, 111 S.Ct. 2597] and *People* v. *Edwards*, *supra*, 54 Cal.3d 787. Accordingly, defendant's claim must be rejected.

4. *Biblical References.*

Defendant contends that the prosecutor violated his rights to due process, a fair trial, separation of church and state, and freedom from cruel and unusual punishment by quoting biblical authority in his final argument. We agree that the prosecutor's argument was improper, but we conclude that it does not require reversal of the penalty judgment.

During final argument, defense counsel stated, inter alia: "It seems almost to be in the theater of absurd to be talking about life and death. I don't know what gives me the right to talk about it . . . . [¶] What we have to really talk about is values, purpose. You have to confront yourselves in terms of your own feelings, what you demand from society, what you really demand from Mr. Sandoval, what you demand from yourselves. [¶] Revenge? That's really what we're talking about. When you convicted Mr. Sandoval of these four murders and found the special circumstances to be true, you already guaranteed one thing. Fred Sandoval will die in the penitentiary is one of them in the State of California. Period. He will never come out. He will die in the penitentiary. [¶] The question is is he going to die whatever it is in three years in the gas chamber or is he going to die of old age in the pen or is he going to die because someone stabs him in the back in the penitentiary? But the reality is that he is going to die in the penitentiary. That's already been decided and you decided that.

"And in facing you again and thinking about that and thinking about how hard your job is, how difficult your job is, in reality you could sit, play God

to an individual. . . . [¶] In some sense, I really don't know which is worse, execution or the gas chamber or that kind of life in prison. But you have that power alone. Any one of you can stop the execution alone. You have that power. I have never held that awesome power of holding a person's life in my hands. You have that power. You alone. [¶] You also have that responsibility that you are going to carry for the very rest of your life whether you push that button or not. And the bottom line is it's revenge. Because society to you because you are society, you want to extract revenge. Or is it bad enough to stop it and let this man live out his life in prison? . . . [¶] I have come to grasp it now. I looked at you in the eye and you can look back at me. Doesn't change anything. Nothing will bring back Anthony Aceves and Gilbert Martinez and the two Wells. Nothing. Won't change. Bottom line is revenge. Just pure and simple. Vengeance.

"If that's what you want, that's what you felt, you push the button. An eye for an eye, a tooth for a tooth, a stripe for a stripe, a life for a life. [¶] I don't think society requires revenge. I don't think that you require revenge. An eye for an eye. [¶] Ghandi said we do this eye for an eye thing, make society require it and do it, what happens is the whole world becomes blind. The light is shut out. That's not right. Don't shut out the light. Don't make the world blind. Don't push that button."

The prosecutor responded to defense counsel's argument by stating: "He told you that it's absurd to talk about life and death, that the law is absurd, that you are playing God, that it's revenge. [¶] And that is to get you, of course, to vote for life without the possibility of parole. Well, death is a legitimate means of punishment in this state. It's available in this state. You are called upon to impose it if you think it's appropriate. You are a cross section of the community. People are judged by a jury of their peers. You make that determination whether the defendant should get the death penalty or life without the possibility of parole. The defense wants to make that burdensome for you. ['] Each and everyone [*sic*] of you from here on must live with that decision. Push that button over there. You must live with that decision for the rest of your life.['] [¶] Well if it wasn't you called upon to carry out the will of the People of the State of California, would have been another jury, because that's our system. That's how the law is affected in this state. [¶] Don't once think that you have to feel burdened and depressed because I voted for death. You are doing what the law says if it's substantial, the aggravation substantially outweighs the mitigation. Don't listen to this lawyer talk. . . ."

"Mr. Applebaum says don't play God. Let every person be in subjection to the governing authorities for there is no authority except from God and those

which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear or authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God an Avenger who brings wrath upon one who practices evil. [¶] You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right. . . . [¶] . . . Let him have the opportunity to get his soul right. That's the only way to get his attention. You are not playing God. God ordains authority."

(26a) Defendant asserts that the material in the previous paragraph was a paraphrase of Romans 13:1-7 and that such reliance on biblical authority to advocate imposition of the death penalty is improper. We agree.

The People seek to justify the argument as having been appropriate rebuttal to defense counsel's argument. While the question is close, we are of the opinion that the prosecutor's argument crossed the line of permissible argument and rebuttal. There are situations in which the prosecutor has been allowed to make comments in rebuttal that would otherwise be improper when such comments are fairly responsive to the argument of defense counsel. (See *People* v. *McDaniel* (1976) 16 Cal.3d 156, 177 [127 Cal.Rptr. 467, 545 P.2d 843]; *People* v. *Hill* (1967) 66 Cal.2d 536, 560 [58 Cal.Rptr. 340, 426 P.2d 908]; see also *United States* v. *Robinson* (1988) 485 U.S. 25, 31-34 [99 L.Ed.2d 23, 30-33, 108 S.Ct. 864].) This, however, is not such a situation.

Here, the prosecutor paraphrased a passage of the Bible that is commonly understood as providing justification for the imposition of the death penalty. Such argument is improper. "The closing statements of counsel should relate to the law and the facts of the case as each side interprets them." (*People* v. *Hawthorne*, *ante*, 43, at p. 60 [__Cal.Rptr.2d __, __P.2d __].) Though not expressly identified as such, the passage was unmistakably biblical in style and readily recognizable by persons schooled in the Christian religion. The prosecutor "may state matters not in evidence that are common knowledge, or are illustrations drawn from common experience, history, or literature." (*People* v. *Love* (1961) 56 Cal.2d 720, 730 [16 Cal.Rptr. 777, 366 P.2d 33].) He may not, however, invoke higher or other law as a consideration in the jury's sentencing determination. (*Jones* v. *Kemp* (N.D.Ga. 1989) 706 F.Supp. 1534, 1559; *Commonwealth* v. *Chambers* (1991) 528 Pa. 558 [599 A.2d 630, 644].) The argument here was clearly improper by exhorting the jury to consider factors outside section 190.3 in making its penalty determination.

(27) Penalty determinations are to be based on the evidence presented by the parties and the legal instructions given by the court. Reference by either party to religious doctrine, commandments or biblical passages tending to undermine that principle is improper. We recognize that the defense must be allowed some latitude in its presentation of mitigating evidence. Nevertheless, we do not understand that latitude to include exhortation of religious canons as a factor weighing against the death penalty. If the defense were to present such argument, it would be subject to objection by the prosecution and possible like-kind argument in rebuttal. (See *United States* v. *Robinson*, *supra*, 485 U.S. at pp. 31-34 [99 L.Ed.2d at pp. 30-33].) What is objectionable is reliance on religious authority as supporting or opposing the death penalty. The penalty determination is to be made by reliance on the legal instructions given by the court, not by recourse to extraneous authority. (*Jones* v. *Kemp*, *supra*, 706 F.Supp. 1534, 1559.) We do not mean to rule out all reference to religion or religious figures so long as the reference does not purport to be a religious law or commandment.

(26b) Though we have found that the argument in this case constituted misconduct, we do not find that it requires reversal of the penalty judgment. The jurors deliberated for four days before indicating that they were split six to six on two counts and five to seven on the other two. After further deliberations the next day, they returned verdicts of life without possibility of parole on three of the counts and death on only one of the counts. Under these circumstances, we find no reasonable possibility that the jury would have reached more favorable verdicts had the misconduct not occurred. (See *People* v. *Brown*, *supra*, 46 Cal.3d 432, 448-449.) The result is the same under the federal *Chapman* test (*Chapman* v. *California* (1968) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065]).

5. *Jury Deadlock.*

Defendant contends that the trial court coerced the jury's verdict by requiring it to continue deliberating after the jury had declared a deadlock.

The jury retired for its penalty deliberations at 1:10 p.m. on Thursday, March 12, 1987, and deliberated until 2:45 p.m. Deliberations continued at 8:05 a.m. on Friday morning until the court recessed the jury at 11:45 a.m. to allow counsel time to submit argument on the appropriate response to a question submitted by the jury. The jury had been given separate verdict forms for each victim and it asked whether it could find that different penalties are applicable to different counts. On Monday morning, March 16, 1987, the court responded to the jury's question by stating, "you should reach a verdict as to each count if you can." At 8:50 a.m. the jury resumed

deliberations and continued until court was adjourned at 1:30 p.m. Deliberations continued on Tuesday, March 17, for an hour and a half. After deliberating two and a half more hours the next morning, March 18, the jury sent the court a note stating, "We cannot reach a verdict. How do you proceed from this point on, and what would you like us to do?" The court called the jury out and asked the foreman whether there was "any reasonable possibility, and I emphasize the word 'possible' that the jury can arrive at a verdict as to any count given further deliberations, the rereading of any testimony or the answering of any question that I can answer?" The foreman answered, "No. We have discussed that possibility, and we don't believe that we can reach a verdict." The court then asked for the jury division on each count and was told that it was six to six on count 1, six to six on count 2 five to seven on count 3, and five to seven on count 4. The court then polled each juror as to "whether you think there is a reasonable possibility with further deliberations you can arrive at a verdict as to any of the counts," and each juror replied, "No."

In a conference outside the jury's presence, the court indicated that it wanted the jury to spend a little more time and that it would probably declare a mistrial if the jury did not reach a verdict the next day. The court estimated that the jury had deliberated for about three full days and noted that a little more time would not be unreasonable in light of the fact that the trial had lasted five months. The court released the jury for that day with directions to return at 7:45 a.m. the next morning. After further deliberations the next morning, Thursday, March 19, 1987, the jury returned its verdicts of life without possibility of parole as to counts 1, 2 and 3, and a verdict of death as to count 4.

Section 1140 provides: "Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

(28) "The determination whether there is reasonable probability of agreement rests in the discretion of the trial court. (*People* v. *Miller* (1990) 50 Cal.3d 954, 993 [269 Cal.Rptr. 492, 790 P.2d 1289]; *People* v. *Sheldon* (1989) 48 Cal.3d 935, 959 [258 Cal.Rptr 242, 771 P.2d 1330]; *People* v. *Rodriguez* (1986) 42 Cal.3d 730, 775 [230 Cal.Rptr. 667, 726 P.2d 113]; *People* v. *Rojas* (1975) 15 Cal.3d 540, 546 [125 Cal.Rptr. 357, 542 P.2d 229, 92 A.L.R.3d 1127]; *People* v. *Carter* (1968) 68 Cal.2d 810, 817 [69 Cal.Rptr. 297, 442 P.2d 353].) The court must exercise its power, however,

without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.' (*People* v. *Carter*, *supra*, 68 Cal.2d at p. 817.)" (*People* v. *Breaux* (1991) 1 Cal.4th 281, 319 [3 Cal.Rptr.2d 81, 821 P.2d 585].) The question of coercion is necessarily dependent on the facts and circumstances of each case. (*Ibid.*)

(29) Defendant argues that the length of time the jury had been deliberating demonstrates that the jury had given careful consideration to the evidence and that a mistrial would have been warranted. (Compare *People* v. *Rich*, *supra*, 45 Cal.3d 1036, 1117 [court declined to declare mistrial on penalty after jury declared itself unable to reach verdict following only one hour of deliberation].) Defendant also cites the virtually even split and the jurors' individual statements against the usefulness of further deliberations as indicating that the court should have declared a mistrial. None of these factors, however, removed the court's discretion to require further deliberations. The jury had deliberated a similar amount of time in *People* v. *Breaux*, *supra*, 1 Cal.4th 281, 317-320, when it was asked to continue even though all of the jurors were negative on the prospects of a verdict. In *People* v. *Rodriguez*, *supra*, 42 Cal.3d 730, 774-777, we found no abuse of discretion in requiring the jury to continue deliberating after it declared itself unable to reach a verdict following 18 days of deliberation.

As further evidence of his claim that the verdict was coerced, defendant points to the facts that the order to continue deliberations was unaccompanied by further explanation and that the verdicts were reached shortly thereafter. The form of the verdicts—three for life and one for death—is also cited as evidence of "considerations of compromise and expediency" (*People* v. *Carter*, *supra*, 68 Cal.2d at p. 817) rather than independent judgment. We are not persuaded. Other explanations for the difference in the verdicts are readily apparent. The jury may have felt that only one death verdict was necessary and that the killing of Marlene Wells was most egregious since she had no involvement with defendant. Thus the difference in the verdicts may be explained by the difference in the circumstances of the crimes. Defendant's assertion that the verdicts should have been uniform is based on the incorrect premise that the aggravating and mitigating circumstances were the same as to each count. They were not. Each murder had its own set of circumstances, which qualified for consideration under factor (a) of section 190.3.

Nothing in the record suggests that the jury was coerced in any way. The court made no statements that could be interpreted as exerting pressure on any juror. The court viewed the jury as a responsible group that took its duty seriously. The court was not unreasonable in concluding that, in light of the

fact that the trial itself had taken some five months, the jury should put in a little more time than the fourteen and one-quarter hours it had deliberated up to that point. The record shows no abuse of discretion.

6. *Separate Verdict Forms.*

(30) Defendant contends that the trial court erred in requiring the jury to return a separate penalty verdict as to each murder victim. Defendant argues that the multiple verdicts obscured the overriding constitutional value of reaching a comprehensive determination of the appropriateness of the death penalty considering all aggravating and mitigating circumstances and invited compromise verdicts. He also claims that the multiple penalty verdicts placed undue emphasis on the characteristics and status of the individual victims, relying on *Booth* v. *Maryland*, *supra*, 482 U.S. 496 and *South Carolina* v. *Gathers*, *supra*, 490 U.S. 805. We are not convinced.

A defendant who kills more than one person may be convicted and punished for each murder. (*People* v. *Andrews* (1989) 49 Cal.3d 200, 225 [260 Cal.Rptr. 583, 776 P.2d 285]; *People* v. *Ramos* (1982) 30 Cal.3d 553, 587 [180 Cal.Rptr. 266, 639 P.2d 908].) Separate penalty verdicts have been returned in other capital cases. The defendant in *People* v. *Bittaker* (1989) 48 Cal.3d 1046 [259 Cal.Rptr. 630, 774 P.2d 659] was convicted of first degree murder of five victims and was given separate death verdicts as to each murder victim. (*Id.* at pp. 1106, 1110, fn. 34.) Likewise, the defendant in *People* v. *Mattson* (1990) 50 Cal.3d 826 [268 Cal.Rptr. 802, 789 P.2d 983], who was convicted of the first degree murder of two girls, was given a separate verdict of death as to each murder victim. (*Id.* at p. 838.) We are not persuaded that there is any impropriety in requiring the jury to return a separate penalty verdict for each capital murder count.

7. *Standard for Imposition of Death.*

(31) The court gave CALJIC No. 8.84.2 (1986 rev.) on the standards for determining the penalty verdicts. Defendant objects to the following language in that instruction: "To return a judgment of death, each of you must be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors that it warrants death instead of life in prison without parole." Defendant complains that the instruction did not inform the jury that a necessary condition for imposition of the death penalty is a finding that aggravation outweighs mitigation rather than merely being "so substantial in comparison."

We rejected a similar challenge to this language in *People* v. *Breaux*, *supra*, 1 Cal.4th at pages 315-316. There, as in this case, the language in

question was preceded by instructions that provide: "The weighing of aggravating and mitigating factors does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various . . . factors you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of aggravating factors with the totality of the mitigating factors." The instructions given, in our view, were sufficient to inform the jury that it could return a death verdict only if the aggravating circumstances outweighed the mitigating circumstances.

8. *Cumulative Error.*

Defendant contends that the cumulative effect of errors during the penalty phase trial requires reversal of the penalty. Since we have found only one error in the penalty phase, there is no cumulative effect.

CONCLUSION

The judgment is affirmed.

Lucas, C. J., Kennard, J., Arabian, J., Baxter, J., and George, J., concurred.

MOSK, J., Concurring and Dissenting.—I concur in the judgment as to guilt, death eligibility, and noncapital sentence. After review, no error or other defect is evident requiring reversal or vacation on any of these issues.

I dissent, however, from the judgment as to the sentence of death. As will appear, there was prejudicial prosecutorial misconduct bearing on this question.

I

In summation at the penalty phase, defense counsel urged the jury to fix the penalty for defendant at life imprisonment without possibility of parole.

By contrast, the prosecutor asked for death. In the course of his argument, he made the following comments.

"I want to respond to some of the things argued by [defense counsel]. He told you that it's absurd to talk about life and death, that the law is absurd, that you are playing God, that it's revenge.

"And that is to get you, of course, to vote for life without the possibility of parole. Well, death is a legitimate means of punishment in this state. It's available in this state. You are called upon to impose it if you think it's appropriate. You are a cross section of the community. People are judged by a jury of their peers. You make that determination whether the defendant should get the death penalty or life without the possibility of parole. The defense wants to make that burdensome for you. ['] Each and everyone [*sic*] of you from here on must live with that decision. Push that button over there. You must live with that decision for the rest of your life.[']

"Well, if it wasn't you called upon to carry out the will of the people of the State of California, would have been another jury, because that's our system. That's how the law is affected in this state.

"Don't once think that you have to feel burdened and depressed because I voted for death. You are doing what the law says if it's substantial, the aggravation substantially outweighs the mitigation. Don't listen to this lawyer talk.

". . . . . .

"[Defense counsel] says don't play God. ['] Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God an avenger who brings wrath upon one who practices evil.[']

"You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right. . . .

". . . . . .

". . . Let him have the opportunity to get his soul right. That's the only way to get his attention. You are not playing God. God ordains authority."

At this point, defense counsel objected and asked to approach the bench, but met with summary denial.

II

"It is of course misconduct for a prosecutor to invoke purported religious law in support of the imposition of the penalty of death." (*People* v. *Hill* (1992) 3 Cal.4th 959, 1016 [__Cal.Rptr.2d __, __P.2d __] (conc. opn. of Mosk, J.); accord, *People* v. *Wrest* (1992) 3 Cal.4th 1088, 1107 [__Cal.Rptr.2d __, __P.2d __].)

"Argument of this sort by a representative of the government offends California statutes and judicial decisions, which establish the positive, secular law of this state as the rule governing the choice between life and death (see *People* v. *Mincey* (1992) 2 Cal.4th 408, 483-484 [6 Cal.Rptr.2d 822, 827 P.2d 388] (conc. & dis. opn. of Mosk, J.)). It also violates the United States and California Constitutions—including their respective clauses concerning establishment of religion (U.S. Const., Amend. I; Cal. Const., art. I, § 4), cruel and unusual punishments (U.S. Const., Amend. VIII; Cal. Const., art. I, § 17), and due process of law (U.S. Const., Amend. XIV; Cal. Const., art. I, § 15)." (*People* v. *Hill*, *supra*, 3 Cal.4th at pp. 1016-1017 (conc. opn. of Mosk, J.); see also *People* v. *Wrest*, *supra*, 3 Cal.4th at p. 1107 [holding that "such an argument tends to diminish the jury's sense of responsibility for its verdict and to imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions"].)

"It is well settled that religion may not play a role in the sentencing process." (*Jones* v. *Kemp* (N.D.Ga. 1989) 706 F.Supp. 1534, 1559; accord, *People* v. *Mincey* (1992) 2 Cal.4th 408, 485 [6 Cal.Rptr.2d 822, 827 P.2d 388] (conc. & dis. opn. of Mosk, J.)]; see *People* v. *Wrest*, *supra*, 3 Cal.4th at p. 1107.)

The jury has "a duty to apply the law of the [jurisdiction] as given by the trial judge, not its own interpretation of the law or its own interpretation of precepts of the Bible, in determining whether the [defendant] should live or die." (*Jones* v. *Kemp*, *supra*, 706 F.Supp. at p. 1559; accord, *People* v. *Mincey*, *supra*, 2 Cal.4th at p. 485 (conc. & dis. opn. of Mosk, J.); see *People* v. *Wrest*, *supra*, 3 Cal.4th at p. 1107.)

The invocation of "the command of extrajudicial 'law' from any source other than the trial judge, no matter how well intentioned, is not permitted." (*Jones* v. *Kemp*, *supra*, 706 F.Supp. at p. 1559; accord, *People* v. *Mincey*, *supra*, 2 Cal.4th at p. 485 (conc. & dis. opn. of Mosk, J.); see *People* v. *Wrest*, *supra*, 3 Cal.4th at p. 1107.)

Indeed, the "use . . . of an extrajudicial code . . . cannot be reconciled with the Eighth Amendment's requirement that any decision to impose death

must be the result of discretion which is carefully and narrowly channelled and circumscribed by the secular law of the jurisdiction." (*Jones* v. *Kemp*, *supra*, 706 F.Supp. at p. 1559; accord, *People* v. *Mincey*, *supra*, 2 Cal.4th at p. 485 (conc. & dis. opn. of Mosk, J.); see *People* v. *Wrest*, *supra*, 3 Cal.4th at p. 1107.)

The Bible, of course, is just such an extrajudicial code. (*People* v. *Mincey*, *supra*, 2 Cal.4th at p. 483 (conc. & dis. opn. of Mosk, J.); *Jones* v. *Kemp*, *supra*, 706 F.Supp. at p. 1559.) Its commands and prohibitions cannot be viewed as mere reliquiae of a culture separated from ours by thousands of miles and thousands of years. This is because "[t]o the average juror, . . . the Bible is an authoritative religious document . . . ." (*Jones* v. *Kemp*, *supra*, at p. 1559; accord, *People* v. *Mincey*, *supra*, at pp. 483-484 (conc. & dis. opn. of Mosk, J.).)

It is also misconduct for a prosecutor to seek to "minimize the jury's sense of responsibility for determining the appropriateness of death." (*Caldwell* v. *Mississippi* (1985) 472 U.S. 320, 341 [86 L.Ed.2d 231, 247, 105 S.Ct. 2633]; accord, *People* v. *Wrest*, *supra*, 3 Cal.4th at p. 1107.) "[U]nder the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.' " (*Caldwell* v. *Mississippi*, *supra*, at p. 329 [86 L.Ed.2d at p. 239], quoting *California* v. *Ramos* (1983) 463 U.S. 992, 998-999 [77 L.Ed.2d 1171, 1178-1179, 103 S.Ct. 3446].) The assumption underlying Eighth Amendment jurisprudence is that "a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.' " (*Caldwell* v. *Mississippi*, *supra*, at p. 341 [86 L.Ed.2d at p. 247].) This premise is threatened when a representative of the government attempts to undermine the jurors' proper attitude and approach.

It hardly needs mention that "[a] prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the State." (*People* v. *Espinoza* (1992) 3 Cal.4th 806, 820 [12 Cal.Rptr.2d 682, 838 P.2d 204].)[1]

III

On the very face of the record, prosecutorial misconduct is manifest.

[1]Because the issue is not raised in this case, I do not attempt to define "religious" misconduct *by defense counsel*. Certainly, the task would require some delicacy. For example, the provisions of the United States and California Constitutions that constrain the prosecution in this regard—including the clauses concerning establishment of religion (U.S. Const., Amend. I; Cal. Const., art. I, § 4), cruel and unusual punishments (U.S. Const., Amend. VIII; Cal. Const., art. I, § 17), and due process of law (U.S. Const., Amend. XIV; Cal. Const., art. I, § 15)—are generally inapplicable to the defense. (But see Cal. Const., art. I, § 29 ["In a criminal case, the people of the State of California have the right to due process of law . . . ."].) I leave this labor to another day. The majority should do so as well. They purport to distinguish between permissible references to "religion" and impermissible references to "religious law." Their "rule" may be suitable for sophists to debate in rhetorical exercises. It is altogether too vague for the bench and bar to apply in criminal trials.

To begin with, the prosecutor invoked purported religious law in support of the imposition of the penalty of death. That is indisputable.

As noted, the prosecutor stated: "[Defense counsel] says don't play God. [']Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God an avenger who brings wrath upon one who practices evil.['] [¶] You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right." The prosecutor returned to the point: "Let him have the opportunity to get his soul right. That's the only way to get his attention. You are not playing God. God ordains authority."

In a word, the "rule of decision" that the prosecutor urged the jury to apply was assertedly religious. He cited the Bible to the jurors. To be sure, he did not expressly identify the relevant passage—which is Romans 13:1-4—as biblical in source and in substance. No such identification was required. There is no reasonable likelihood that the jury understood the words to be anything other than what they were.

Further, the "purpose of punishment" that the prosecutor called on the jury to serve was assertedly religious as well. He exhorted the jurors to destroy defendant's corruptible body in order to save his immortal soul.[2]

[2]In accord with above analysis is *Commonwealth* v. *Chambers* (1991) 528 Pa. 558 [599 A.2d 630]. There, the Pennsylvania Supreme Court considered a claim of prosecutorial misconduct based on comments that "Karl Chambers has taken a life" and "As the Bible says, 'and the murderer shall be put to death.' " It found the point meritorious. Its reasoning was as follows:

"In the past we have narrowly tolerated references to the Bible and have characterized such references as on the limits of 'oratorical flair' and have cautioned that such references are a dangerous practice which we strongly discourage. *Commonwealth* v. *Henry*, 524 Pa. 135, 569 A.2d 929 (1990); *Commonwealth* v. *Whitney*, 511 Pa. 232, 512 A.2d 1152 (1986). We now admonish all prosecutors that reliance in any manner upon the Bible or any other religious

The majority rightly conclude that the prosecutor's impropriety cannot be justified or even excused as "fairly responsive" to comments in defense counsel's summation. True, the prosecutor asserted that he "want[ed] to respond to some of the things argued by [defense counsel]." But there was nothing "fairly responsive" about what he would soon say. Perhaps the matter would have been different if counsel had declared or even suggested that the death penalty was inappropriate under some religious law. He had not done so. Notwithstanding his utterance of the word "God" and his reference to *lex talionis*, his argument was altogether secular—to the effect that the jurors each held an absolute power of life and death over defendant; that they should reject death as empty vengeance; and that they should choose life to vindicate what is good in human beings and human society.

More important, even a "fair response" of this kind by a prosecutor would be altogether impermissible. It is plain from the analysis set out above that the government is prohibited from interjecting religion into the sentencing process. The prosecutor is its representative. The bar that constrains the principal constrains the agent as well.

In addition, the prosecutor sought to minimize the jury's sense of responsibility for determining the appropriateness of death. That too is indisputable.

As noted, the prosecutor stated: "The defense wants to make [the penalty determination] burdensome for you. [¶] Each and everyone [*sic*] of you from here on must live with that decision. Push that button over there. You must live with that decision for the rest of your life.[¶] [¶] Well, if it wasn't you called upon to carry out the will of the people of the State of California,

writing in support of the imposition of a penalty of death is reversible error per se and may subject violators to disciplinary action.

"Here, the prosecutor argued, 'As the Bible says, "and the murderer shall be put to death." ' This reference is substantially different than the references tolerated in *Henry* and *Whitney* where the prosecutor allegorically likened the Defendant to the Prince of Darkness mentioned in the Bible to establish that he was an evil person.

"More than allegorical reference, this argument by the prosecutor advocates to the jury that an independent source of law exists for the conclusion that the death penalty is the appropriate punishment for [Chambers]. By arguing that the Bible dogmatically commands that 'the murderer shall be put to death,' the prosecutor interjected religious law as an additional factor for the jury's consideration which neither flows from the evidence or any legitimate inference to be drawn therefrom. We believe that such an argument is a deliberate attempt to destroy the objectivity and impartiality of the jury which cannot be cured and which we will not countenance. Our courts are not ecclesiastical courts and, therefore, there is no reason to refer to religious rules or commandments to support the imposition of a death penalty.

"Our Legislature has enacted a Death Penalty Statute which carefully categorizes all the factors that a jury should consider in determining whether the death penalty is an appropriate punishment and, if a penalty of death is meted out by a jury, it must be because the jury was satisfied that the substantive law of the Commonwealth requires its imposition, not because of some other source of law." (*Commonwealth* v. *Chambers*, *supra*, 528 Pa. at pp. 586-587 [599 A.2d at p. 644].)

would have been another jury, because that's our system. That's how the law is affected in this state. [¶] Don't once think that you have to feel burdened and depressed because I voted for death. You are doing what the law says if it's substantial, the aggravation substantially outweighs the mitigation. Don't listen to this lawyer talk."

The prosecutor's impropriety in this regard cannot seriously be denied. Indeed, the majority's efforts here are totally nonexistent—and that in spite of the fact that defendant expressly raised the claim in his briefing before this court.

I now turn from the fact of the prosecutor's misconduct to its consequence.

It is the general rule for error under California law that reversal requires prejudice (*People* v. *Gordon* (1990) 50 Cal.3d 1223, 1253 [270 Cal.Rptr. 451, 792 P.2d 251]) and prejudice in turn requires a reasonable possibility of an effect on the outcome when, as here, penalty in a capital trial is involved (*People* v. *Brown* (1988) 46 Cal.3d 432, 446-448 [250 Cal.Rptr. 604, 758 P.2d 1135]).

Similarly, it is the general rule for error under the United States Constitution that reversal requires prejudice and prejudice in turn is presumed unless the government shows that the failing was harmless beyond a reasonable doubt. (See, e.g., *Rose* v. *Clark* (1986) 478 U.S. 570, 576-579 [92 L.Ed.2d 460, 469-471, 106 S.Ct. 3101].)

The prosecutor's misconduct implicates both California law and the United States Constitution. It appears to be subject to the general rule of harmless-error analysis. Thus, insofar as state law is concerned, the "reasonable possibility" standard is applied. Insofar as the federal charter is involved, the "reasonable doubt" test is employed.

The prosecutor's misconduct went to the first, last, and only issue before the jury in the penalty phase of this capital trial, viz., whether they were to take or spare defendant's life. The evidence in aggravation was not insubstantial. But not insubstantial too was the evidence in mitigation.

The prosecutor's attempt to minimize the jury's responsibility cannot be deemed unsuccessful. "A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that

issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion." (*Caldwell* v. *Mississippi*, *supra*, 472 U.S. at p. 333 [86 L.Ed.2d at p. 242].) Comments like those of the prosecutor in this case offered the jurors an easy way to avoid a hard choice—in fact, an especially hard choice, to judge from the relatively close balance of aggravation and mitigation at the penalty phase and the labored progress of the deliberations thereafter.

Perhaps more significant, the prosecutor's argument from purported religious law must have carried special force, incorporating as it did "what many consider an authoritative source—if not Authority Itself." (*People* v. *Mincey*, *supra*, 2 Cal.4th at p. 487 (conc. & dis. opn. of Mosk, J.).)

I acknowledge that the jury did not return its verdict of death immediately after the prosecutor's misconduct and that it also returned three verdicts of life. "That fact means only that [the] impropriety did not instantly [and totally] determine the outcome. It simply does not suggest that it was without improper influence." (*People* v. *Mincey*, *supra*, 2 Cal.4th at p. 487 (conc. & dis. opn. of Mosk, J.).) The majority appear to assume that the force of the impropriety was dissipated in the course of deliberations. A contrary assumption, however, seems more reasonable on this record: the impropriety's force actually determined the course of deliberations and thereby prevented four early verdicts of life.[3]

In sum, the misconduct raises a reasonable possibility of an adverse effect on the outcome, and cannot be deemed harmless beyond a reasonable doubt.

IV

For the reasons stated above, I would set aside the sentence of death.

[3]In accord on this point as well is *Commonwealth* v. *Chambers*, *supra*, 528 Pa. 558 [599 A.2d 630]. As noted, the Pennsylvania Supreme Court in that case held meritorious a claim of prosecutorial misconduct based on the comments that "Karl Chambers has taken a life" and "As the Bible says, 'and the murderer shall be put to death.'" (See fn. 2, *ante*.) "Because the prosecutor's argument in favor of the death penalty reached outside of the evidence of the case and the law of this Commonwealth," concluded the court, "we are not convinced that the penalty was not the product of passion, prejudice or an arbitrary factor and, therefore, pursuant to our Death Penalty Statute, we must vacate the sentence of death . . . ." (528 Pa. at p. 587 [599 A.2d at p. 644].)

APPENDIX B

Denial of Petition for Rehearing
February 10, 1993

SUPREME COURT
FILED
FEB 10 1993
Robert Wandruff Clerk
DEPUTY

No. CR26405
S004765

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

v.

ALFRED ARTHUR SANDOVAL, Appellant

Petition for rehearing DENIED.

Mosk, J. is of the opinion the petition should be granted.

Opinion modified.

Chief Justice

DECLARATION OF SERVICE

Re: Alfred Arthur Sandoval, No.

I, Eric S. Multhaup, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at 235 Pine Street, Suite 1300, San Francisco, California 94104.

I served the attached

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

on the following individuals/entities by placing a true and correct copy of the document in a sealed envelope with postage thereon fully prepaid, in the United States mail at Mill Valley, California, addressed as follows:

Attorney General
300 South Spring Street
Fifth Floor
Los Angeles, CA 90013

I declare under penalty of perjury that service was effected on June 10, 1993 at Mill Valley, California and that this declaration was executed on June 10, 1993 at Mill Valley, California.

ERIC S. MULTHAUP
(Typed Name)

(Signature)

PROOF OF SERVICE BY MAIL

Code of Civil Procedure sections 1013 subd. (a), 2015.5

I declare that:

I am employed in the County of Marin, State of California. I am over the age of eighteen and not a party to the within action. My business address is 235 Pine St. Ste 1300 San Francisco, CA 94104.

On June 2013, I served the attached Petition for Coram... in said cause by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid, in the United States mail at [illegible], California, addressed as follow:

[illegible]

I declare under penalty of perjury and under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on June [illegible], at [illegible], California.

[illegible]

ORIGINAL

ORIGINAL

Supreme Court, U.S.
FILED
JUL 15 1993
OFFICE OF THE CLERK

NO. 92-9049

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ALFRED ARTHUR SANDOVAL, Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of California

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Was petitioner deprived of due process and a fair jury trial by the use of California's reasonable doubt instruction?

2. Did the California Supreme Court fail to conduct a constitutionally adequate harmless error review and thereby deprive petitioner of due process and subject him to cruel and unusual punishment?

3. Does the California Supreme Court's affirmance rate demonstrate a pervasive abdication of its responsibility to conduct constitutionally adequate harmless error review?

TABLE OF CONTENTS

	Page
BRIEF OF RESPONDENT IN OPPOSITION	1
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
SUMMARY OF REASONS FOR DENYING THE PETITION	4
ARGUMENT	5
I THE JURY WAS PROPERLY INSTRUCTED ON THE DEFINITION OF REASONABLE DOUBT	5
II THE CALIFORNIA SUPREME COURT CONDUCTED A CONSTITUTIONALLY ADEQUATE HARMLESS ERROR REIVIEW IN THIS CASE, AND HAS NOT ABDICATED ITS RESPONSIBILITY TO CONDUCT CONSTITUTIONALLY ADEQUATE HARMLESS ERROR REVIEWS IN PREVIOUS CAPITAL CASES	12
CONCLUSION	24

TABLE OF AUTHORITIES

Cases	Page
Boyde v. California, 494 U.S. 370, 380, 110 S.Ct 1190, 108 L.Ed.2d 316 (1990)	11
Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990)	5, 6, 7-10, 22
Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, 24 A.L.R.3d 1065 (1968)	14, 22
Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990)	19
Estelle v. McGuire, 502 U.S. ___, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)	11
Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985)	11, 22
Gaskins v. McKellar, __ U.S. __, 111 S. Ct. 2277 114 L.Ed.2d 728 (1991)	6
Pensinger v. California, __ U.S. __, 112 S.Ct. 351, 116 L.Ed.2d 290 (1991)	18-20
People v. Brown, 46 Cal.3d 432 (1988)	14
People v. Fook, 141 Cal. 548 (1904)	10
People v. Jennings, 53 Cal.3d 334, 279 Cal.Rptr. 780, 807 P.2d 1009 (1991)	7, 11
People v. Lewis, 50 Cal.3d 262, 266 Cal.Rptr. 834, 786 P.2d 892 (1990)	16

People v. Mitchell Sims, __ Cal.4th __ (June 28, 1993)	22
People v. Pensinger, 52 Cal.3d 1210, 278 Cal.Rptr. 640, 805 P.2d 899 (1991)	19
People v. Sandoval, 4 Cal.4th 155, 14 Cal.Rptr.2d 342, 841 P.2d 862 (1992)	13-15
Stringer v. Black, __ U.S. __, 112 S.Ct. 1130, 117 L.Ed.2d. 367 (1992)	20
Sullivan v. Louisiana, ___ U.S. ___ (June 1, 1993)	10, 22
United States v. Phillips, 664 F.2d 971 (5th Cir. 1981)	18

Statutes

Pen. Code, § 190.3	13

Court Rules

CALJIC No. 2.90	5-11

NO. 92-9049

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ALFRED ARTHUR SANDOVAL, Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of California

BRIEF OF RESPONDENT IN OPPOSITION

* * *

OPINION BELOW

Petitioner, Alfred Arthur Sandoval, seeks review of the California Supreme Court's decision affirming his convictions for murder and judgment of death. The opinion was issued on December 14, 1992, and is reported at 4 Cal.4th 155, 14 Cal.Rptr.2d 342, 841 P.2d 862 (1992). A copy of the opinion is attached as Appendix A to petitioner's Petition for Writ of Certiorari.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1257a.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner relies on the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution which are set forth in the Petition for Writ of Certiorari at page 2.

STATEMENT OF THE CASE

Petitioner was sentenced to death under the current California Death Penalty Law enacted in 1978 by initiative, following his convictions for the attempted murder of Manuel Torres and the first degree murders of Gilbert Martinez, Anthony Aceves, Raymond Wells, and Marlene Wells.

The prosecution evidence at the guilt phase of petitioner's trial established that on October 14, 1984, petitioner shot and killed Gilbert Martinez and Anthony Aceves during a gang-related fight at Belvedere Park in Los Angeles. He also attempted to kill Manuel Torres during the gang fight. Several eyewitnesses saw petitioner kill his unarmed victims. Reporter's Transcript on Appeal [hereinafter RT], pp. 2354-2650. Petitioner's theory of defense was self-defense. RT 4369-4370, 4404.

On October 31, 1984, petitioner shot and killed Ray and Marlene Wells in their home, because they had given police information concerning the location of the car petitioner used on the night of the Belvedere Park murders. Petitioner telephoned Benjamin Verduzco after the murders and told him that he had committed the murders because the Wells' had snitched to the

police about his car. RT 3264-3297. Petitioner presented an alibi defense. RT 4569, 4958-4966, 5031-5054.

The jury convicted petitioner of four counts of first degree murder and also found true four allegations of the special circumstance of multiple murders, within the meaning of California Penal Code section 190.2(a)(3). The jury also convicted petitioner of one count of attempted murder. Clerk's Transcript on Appeal [hereinafter CT], pp. 1495-1496, 1608.

At the penalty phase, the prosecution presented the following evidence in aggravation: 1) petitioner's 1978 assault with a deadly weapon upon a police officer; 2) petitioner's 1979 conviction of assault with intent to kill; 3) petitioner's 1985 felonious assault and infliction of great bodily injury upon Guy Walker at the Los Angeles County Jail. RT 5718-5743, 5786-5798, 5824-5831, 5854-5864. In mitigation, petitioner presented evidence concerning the Walker incident, his in-custody behavior at county jail, his childhood, and his family and friends. RT 5879-5898, 5940-5957, 5997-6006, 6041-6084, 6123-6131, 6174-6188, 6222-6227, 6379-6389, 6412-6416.

The jury found life without the possbility of parole to be the appropriate punishment for the murders of Gilbert Martinez, Anthony Aceves, and Raymond Wells. The jury found death to be the appropriate punishment for the murder of Marlene Wells. CT 1733.

Petitioner's appeal to the California Supreme Court was automatic under California law. The California Supreme Court

affirmed the judgment and penalty in its entirety. The petition for reheaing was denied. Petition, Appendix B. A Petition for Writ of Habeas Corpus is currently pending in the California Supreme Court.[1]

SUMMARY OF REASONS FOR DENYING THE PETITION

First, CALJIC No. 2.90 is constitutionally sound. That instruction, unlike the Louisiana instruction condemned by this Court in Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), does not transform the traditional definition of reasonable doubt into a higher degree of doubt.

Second, petitioner's complaint concerning the California Supreme Court's harmless error review addresses a matter of state law and also is unfounded. What may or may not have happened in the course of the California Supreme Court's appellate reviews of other capital cases has no bearing on the issue whether in this case petitioner has suffered a constitutional deprivation at the hands of the state high court. Moreover, the California Supreme Court conducted a constitutionally adequate harmless error review of prosecutorial misconduct during penalty phase final argument to the jury in this case.

---

1. Three of the issues raised by petitioner in the pending Petition for Writ of Habeas Corpus in the California Supreme Court are noted on page 22 of the Petition for Writ of Certiorari (ie. the prosecution's alleged failure to disclose benefits conferred on its star witnesses, the failure to correct the witnesses' alleged false testimony denying such benefits, and defense counsel's alleged failure to investigate mitigating evidence.)

ARGUMENT

I

THE JURY WAS PROPERLY INSTRUCTED ON THE DEFINITION OF REASONABLE DOUBT

Relying upon this Court's opinion in Cage v. Louisiana 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), petitioner contends the California reasonable doubt instruction, CALJIC No. 2.90, improperly dilutes the prosecution's constitutionally imposed burden of proof beyond a reasonable doubt.[2/] Petition, pp. 4-11. Petitioner's contention is without merit.

Respondent first notes that this Court's opinion in Cage does not in any way refer to or rule upon the California instruction on reasonable doubt. In fact, the opinion does not invalidate any reasonable doubt instruction other than the Louisiana instruction considered therein. Further, the opinion does not purport to define the term "reasonable doubt" and does not supply an instruction on the subject. It is clear from a reading of the opinion, which is less than two pages in length,

---

2. CALJIC No. 2.90, as given in this case, provides: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] guilt is satisfactorily shown, [he] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: it is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." CT 604; emphasis added.

that any extension of its holding beyond the scope of the instruction actually considered therein exceeds the intent of the opinion. See, Gaskins v. McKellar, __ U.S. __, 111 S. Ct. 2277 114 L.Ed.2d 728 (1991); U.S. v. Nolasco, 926 F.2d 869, 871-873 (1991).

Moreover, CALJIC No. 2.90, which embodies the California reasonable doubt concept, bears little similarity to the Louisiana instruction considered in Cage. In fact, the only similarity between the two instructions is the use of the phrase "moral certainty." That phrase, in and of itself, is not offensive to constitutional standards. Instead, this Court was critical of the terms "grave uncertainty" and "actual substantial doubt" which are found in the Louisiana instruction:

> "It is plain to us that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to 'moral certainty,' rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." Cage v. Louisiana, supra, 490 U.S. 39, 111 S.Ct. 328, 329-330, 112 L.Ed.2d 339.

The terms "grave uncertainty" and "actual substantial doubt" are not used in CALJIC No. 2.90. Thus, respondent

submits, a reasonable juror would not have interpreted CALJIC No. 2.90 to allow a finding of guilt on a degree of proof below that required by the Due Process Clause.[3/]

Moreover, the Cage instruction performs the exact opposite function of the California instruction considered here. In Cage, the instruction reads:

> "If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral

3. In People v. Jennings 53 Cal.3d 334, 279 Cal.Rptr. 780, 807 P.2d 1009 (1991), the California Supreme Court specifically found that CALJIC No. 2.90, unlike the instruction discussed in Cage, does not transform the traditional definition of reasonable doubt into a higher degree of doubt. Id., at p. 386.

> certainty." Cage, supra, 490 U.S. 39, 111 S.Ct. 328, 329, 112 L.Ed.2d 339.

As can be seen by a simple review of the Cage instruction, the instruction begins by telling the juror that he is required to acquit if he has a reasonable doubt as to guilt. However, the instruction then quickly focuses on impressing upon the juror that the doubt must be substantial. It concludes with the constitutionally offensive statement that, "What is required [to convict] is not an absolute or mathematical certainty, but a moral certainty." Cage found that this phrase could be interpreted as allowing a reasonable juror to convict on the basis of a vague "moral certainty" instead of a more exacting standard of an "evidentiary certainty." This Court found that this was particularly true when considered with the words, "substantial" and "grave uncertainty," which it found tended to "suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." Cage, supra, 490 U.S. 39, 111 S.Ct. 328, 329-330, 112 L.Ed.2d 339.

In California, the phrase "moral certainty" is marshalled on the side of the defendant and not the prosecution. As can be seen in footnote 2 infra, the California jury is told that it must find the defendant guilty beyond a reasonable doubt in order to convict. CALJIC No. 2.90 then defines reasonable doubt as the lack of "moral certainty as to the truth of the charges." As such, the plain language of the statute prohibits the juror from voting for guilt unless he is morally convinced

that the charges are true. However, nothing in the instruction allows him or her to vote for a conviction based solely on his moral belief in guilt. As such, there is no Cage error.

Petitioner also complains that the repeated use of the adjective "moral" in CALJIC No. 2.90 unconstitutionally draws the jury away from its role as an objective evaluator of the evidence into a more subjective arbiter of moral values. Specifically, petitioner complains that the instructional language of CALJIC No. 2.90 "served to obscure the otherwise crucial segregation in the jurors' minds between personally negative responses to the defendant versus the analysis of the prosecution's evidence." Petition, pp. 8-11. As shown above, even if this is true in California, petitioner has no cause to complain because the term merely imposes a higher burden on the state.

Notwithstanding the foregoing, in Cage this Court assessed the propriety of the reasonable doubt instruction by considering how reasonable jurors could have understood the charge as a whole. Cage v. Louisiana, supra, 490 U.S. 39, 111 S.Ct. 328, 329-330, 112 L.Ed.2d 339. Here, in addition to the reasonable doubt instruction, the jury was instructed to base its verdict on the facts of the case and the law. The jury was also instructed it must not be influenced by pity, prejudice, bias, passion, public opinion or public feeling. Specifically, the jurors were instructed:

> "You must not be biased against the defendant because he has been arrested for this offense, or because he

> has been charged with a crime, or because he has been brought to trial. None of these circumstances is evidence of his guilt and you must not infer or assume from any or all of them that he is more likely to be guilty than innocent." CT 1509-1511.

Thus, when the entire instructional phase is viewed as a whole, it is clear the jury in this case did not substitute their moral feelings for their impartial analysis.[4/]

Petitioner further argues that constitutional defects in CALJIC No. 2.90 require reversal of his conviction. Petitioner relies on the recent case of Sullivan v. Louisiana, ___ U.S. ___ (June 1, 1993), in support of his claim. Petition, p. 11.

Respondent first notes that petitioner's reliance upon Sullivan is misplaced. In Sullivan, the trial judge gave a definition of reasonable doubt that was "essentially identical" to the one held unconstitutional in Cage v. Louisiana, supra, 498 U.S. 39. Sullivan v. Louisiana, supra, ____ U.S. ____. Respondent again submits that CALJIC No. 2.90, unlike the instruction discussed in Cage, does not transform the traditional definition of reasonable doubt into a higher degree of doubt but in fact imposes a higher burden on the prosecution. CALJIC No.

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4. In People v. Fook 141 Cal. 548 (1904), the California Supreme Court specifically rejected defendant's claim that use of the phrases "moral certainty" and "moral evidence" permitted the jury to be governed by their impressions and not by their convictions. Id., at p. 549.

2.90 is thus constitutionally sound. People v. Jennings, supra, 53 Cal.3d 334, 386, 279 Cal.Rptr. 780, 807 P.2d 1009.

Moreover, given the fact that CALJIC No. 2.90 merely requires a juror contemplating a guilty vote to be convinced of the truth of the charges, ie., guilt to the point of moral certainty, there is no "reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." Estelle v. McGuire, 502 U.S. ___, 112 S.Ct. 475, 482, 116 L.Ed.2d 385 (1991).

As noted above, a challenged instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole. Boyde v. California, 494 U.S. 370, 380, 110 S.Ct 1190, 108 L.Ed.2d 316 (1990). Also, this Court may assume the jury understood and followed the instructions given them. Francis v. Franklin, 471 U.S. 307, 324, n. 9, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). Since the jury in this case understood it could not base a finding of guilt upon subjective and ethical considerations rather than upon an objective evaluation of the evidence, there is no reasonable likelihood the jury applied CALJIC No. 2.90 in a way that violates the Constitution. Thus, petitioner's contention must fail.

II

THE CALIFORNIA SUPREME COURT CONDUCTED A CONSTITUTIONALLY ADEQUATE HARMLESS ERROR REIVIEW IN THIS CASE, AND HAS NOT ABDICATED ITS RESPONSIBILITY TO CONDUCT CONSTITUTIONALLY ADEQUATE HARMLESS ERROR REVIEWS IN PREVIOUS CAPITAL CASES

Petitioner contends the California Supreme Court failed to conduct a constitutionally adequate harmless error review of prosecutorial misconduct during penalty phase final argument to the jury thereby depriving him of due process and subjecting him to cruel and unusual punishment. Petition, pp. 11-16. Petitioner further contends the California Supreme Court's affirmance rate since 1990 demonstrates a pervasive abdication of its responsibility to conduct constitutionally adequate harmless error review. Petition, pp. 16-25. Petitioner's contentions are without merit.

During penalty phase final argument to the jury, defense counsel told the jury that it was absurd to talk about life and death, and that the death penalty is absurd. He also questioned his right to discuss life and death, and thereby impliedly questioned the jury's right to decide life and death. Defense counsel told the jury that it was playing God, because the jurors had the awesome power of holding petitioner's life in their hands. Finally, making a biblical reference to "an eye for an eye, a tooth for a tooth," defense counsel told the jury that if it reached a verdict of death, it would be out of pure revenge and vengeance: "If that's what you want [an eye for an eye, a

tooth for a tooth, a stripe for a stripe, a life for a life] you push the button." (RT 6499, 6501, 6503, 6512.)

The prosecutor responded by telling the jury that the death penalty is not absurd, but instead a legitimate means of punishment in this state - one the jury could impose *if* it found it appropriate. The prosecutor also told the jurors that they were not playing God, but instead doing what God says. In quoting the Bible, the prosecutor explained that God ordains a governing authority to punish those who do evil. (RT 6537-6540.)

The California Supreme Court ruled that the prosecutor's argument was misconduct, because it exhorted the jury to consider factors outside California Penal Code section 190.3 in making its penalty determination. "What is objectionable is reliance on religious authority as supporting or opposing the death penalty. The penalty determination is to be made by reliance on the legal instructions given by the court, not by recourse to extraneous authority." People v. Sandoval 4 Cal.4th 155, 193-194, 14 Cal.Rptr.2d 342, 841 P.2d 862 (1992). However, the Court also ruled the error did not require reversal of the penalty judgment:

> "The jurors deliberated for four days before indicating that they were split six to six on two counts and five to seven on the other two. After further deliberations the next day, they returned verdicts of life without possibility of parole on three of the counts and death

> on only one of the counts. Under these circumstances, we find no reasonable possibility that the jury would have reached more favorable verdicts had the misconduct not occurred. See People v. Brown 46 Cal.3d 432, 448-449 (1988). The result is the same under the federal Chapman test [Chapman v. California 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065] (1968))." People v. Sandoval, supra, 4 Cal.4th 155, 194, 14 Cal.Rptr.2d 342, 841 P.2d 862.

In People v. Brown, supra, 46 Cal.3d 432, 250 Cal.Rptr. 604, 758 P.2d 1135, the California Supreme Court determined that the "reasonable-possibility test" is the proper constitutional miscarriage of justice standard when assessing the effect of state-law error at the penalty phase of a capital trial. Id., at p. 448. Thus, in citing Brown and finding there was no reasonable possibility that the jury in this case would have reached more favorable verdicts had the misconduct not occurred, the California Supreme Court clearly found the prosecutorial misconduct in this case to be state-law error which did not amount to a federal constitutional violation.[5]

Petitioner complains the above-cited harmless error review by the Sandoval court was constitutionally inadequate. If petitioner is asserting a federal constitutional right to a

---

5. As discussed below, the California Supreme Court also noted that even if the prosecutorial misconduct was federal constitutional error, the error was harmless beyond a reasonable doubt pursuant to Chapman v. California, supra, 386 U.S. 18.

correct state law harmless error analysis, respondent is unaware of any grant of certiorari in a California capital case on a question of the adequacy of appellate review. Thus, petitioner's contention should be rejected.

Moreover, if petitioner is complaining about the California Supreme Court's alternative holding as to federal harmless error, his complaints about the California Supreme Court's review are meritless. First, petitioner asserts there was a finding of federal constitutional error in this case. Petition, p. 12. However, as noted above, the California Supreme Court clearly found the prosecutorial misconduct in this case to be state-law error which did not amount to a federal constitutional violation. People v. Sandoval, supra, 4 Cal.4th 155, 194.)

Secondly, petitioner argues prejudice can be shown by the jury's verdict of death for the murder of Marlene Wells, since "each verdict was necessarily based on the same corpus of aggravating and mitigating evidence." Petition, p. 15.

The facts of this case conclusively demonstrate, however, that even if the error was of constitutional dimensions, it was harmless beyond a reasonable doubt. The verdicts clearly indicate that the death penalty was imposed, not because of any argument by the prosecutor, but instead based on the motive for the killing. Here, petitioner killed four people. He could have been given a death sentence for each of the killings. However, the jury only returned a death verdict for one of the killings.

This is because the totality of the aggravating and mitigating circumstances was not precisely the same for each count. Petitioner killed Marlene Wells because she saw him kill her husband. RT 3296. Therefore, unlike any of the other murder victims, petitioner subjected Marlene Wells to watching the death of a loved one before killing her and she was the only victim killed merely because of her status as a witness.

Moreover, petitioner shot and killed Gilbert Martinez and Anthony Aceves during a gang-related fight at Belvedere Park. Petitioner killed Ray Wells because he thought Wells had given police information concerning the location of the car he had used on the night of the Belvedere Park murders. Petitioner did not have a dispute with Marlene Wells. She was a completely innocent victim who died because she saw petitioner kill her husband.

At the penalty phase, "the jury decides a question the resolution of which turns not only on the facts, but on the jury's moral assessment of those facts as they reflect on whether the defendant should be put to death." People v. Lewis 50 Cal.3d 262, 283-284, 266 Cal.Rptr. 834, 786 P.2d 892 (1990). Since Marlene Wells was a completely innocent victim who was forced to watch the death of a loved one before receiving gunshot wounds to the head and neck, respondent submits the jury's moral assessment that petitioner should be put to death was appropriate under all of the circumstances.

Although petitioner decries the analysis of the California Supreme Court as deficient, it is clear the harmless

error review conducted by that body noted the presence of those split verdicts. Not only do the split verdicts indicate the death penalty was imposed on petitioner due to the reason he killed that particular victim as opposed to the other victims, but, from a standpoint of common sense, if the jury had been emotionally swayed by the prosecutor's argument it would have imposed death for all four of the killings and not just one. Here, to the contrary, petitioner's argument is predicated upon the inherently unlikely scenario the jury was able to ignore the prosecutor's comments while returning three life verdicts but finally succumbed to the argument when deciding on the fourth verdict. Petitioner's contention lacks gravity. It is clear beyond a reasonable doubt that the sole verdict of death was wholly attributable to the facts of that murder and not to the improper argument of the prosecutor. As such, despite its brevity, the facts of the case demonstrate the propriety of the finding of harmless error in the state court opinion.

Petitioner also argues the Sandoval court's review was inadequate because that court used criteria which weigh in favor of a finding of prejudice. Specifically, petitioner asserts without citation that the federal courts have spoken "with one voice" that lengthy and close jury deliberations weigh in favor of a prejudice finding when a constitutional error has occurred. Petition, pp. 12-14. Petitioner is mistaken.

Respondent again notes there was no constitutional error in this case. In addition, contrary to petitioner's claim,

the length and closeness of jury deliberations does not "uniformly militate in favor of reversal." Petition, p. 13. For example, in United States v. Phillips 664 F.2d 971 (5th Cir. 1981), the court held that continuation of deliberations for an entire week after the alternate juror was impaneled negated any possible coercive effect or any undue prejudice. Id., at pp. 995-996. Similarly, as noted by the California Supreme Court in its harmless error analysis, the fact the jury in this case did not immediately return with verdicts of death demonstrated the prosecutor's argument obviously did not impassion the jurors to immediately return its verdict of death.

Petitioner also argues the closeness of the jury split prior to its decision provides an "overwhelming basis to infer prejudice." Petition, p. 12. However, the jurors had the difficult task of deciding whether to impose a penalty of death. The members of the jury, both by their verdicts and responses when individually polled, clearly expressed their decision that death was the appropriate punishment for the killing of Marlene Wells. Petitioner's claim is based upon mere speculation and should be rejected.

Petitioner further argues the California Supreme Court's harmless error analysis was inadequate in light of the dissenting opinion of Justices O'Connor and Kennedy in Pensinger v. California __ U.S. __, 112 S.Ct. 351, 116 L.Ed.2d 290 (1991). Respondent submits petitioner's reliance upon the dissent in Pensinger is misplaced.

In Pensinger, the jury found the existence of two special circumstances: the murder was committed in the course of a kidnapping, and the murder was accompanied by the infliction of torture. The California Supreme Court reversed the jury's finding as to the special circumstance of torture, because the jury was not instructed that the circumstance required proof of intent to torture. The Court found the instructional error was not harmless, but upheld the sentence of death because "the erroneous special circumstance finding was only a statutory label which could not have affected the verdict in light of the evidence properly before the jury." People v. Pensinger, 52 Cal.3d 1210, 1255, 278 Cal.Rptr. 640, 805 P.2d 899 (1991).

This Court denied the petition for writ of certiorari to the California Supreme Court. Pensinger v. California, supra, __ U.S. __, 112 S.Ct. 351, 116 L.Ed.2d 290. However, dissenting Justices O'Connor and Kennedy were of the opinion the petition should be granted and that the California Supreme Court's review was insufficient under Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). In Clemons, this Court found the jury had considered an unconstitutionally vague aggravating circumstance, and held the reviewing court could either excise the erroneously considered aggravating circumstance and reweigh the evidence on its own or determine whether the jury would beyond a reasonable doubt have imposed the death sentence even in the absence of the error. Id., at pp. 750-752.

Dissenting Justices O'Connor and Kennedy were of the

opinion that the harmless error review in Pensinger was inadequate because "the California Supreme Court did not reweigh the aggravating and mitigating circumstances" or review the record "to determine whether the jury would beyond a reasonable doubt have imposed the death sentence given a finding of one special circumstance rather than two . . ." Pensinger v. California, supra, __ U.S. __, 112 S.Ct. 351-352, 116 L.Ed.2d 290.

Respondent submits petitioner's reliance upon the dissent in Pensinger is clearly misplaced. Here, the death sentence was not based on an invalid or improperly defined aggravating circumstance in the weighing process of the penalty determination which this Court has found to be of great import. See Stringer v. Black, __ U.S. __, 112 S.Ct. 1130, 117 L.Ed.2d. 367 (1992). Instead, the California Supreme Court found a state law error during final argument which was harmless because there was no reasonable possibility that the jury would have reached more favorable verdicts had the misconduct not occurred. Even so, if the California Supreme Court was required to reweigh the effect of the error, it clearly did so and thus petitioner's contention should be rejected.

Finally, petitioner disagrees with the California Supreme Court's finding of harmless error, and argues he was prejudiced by the prosecutor's argument. Petition, pp. 14-15. Petitioner first argues prejudice is clear given the "evidentiary equipoise between aggravating and mitigating evidence in this

case." Petition, p. 14. Respondent disagrees. The evidence of aggravation in this case was compelling. The circumstances of the cold-blooded multiple murders and appellant's history of violence could not help but impress the jury. The evidence in mitigation, by contrast, established only that petitioner had a tough childhood and was civil to persons who were not his victims.

Petitioner further argues the jury used the prosecutor's argument as the mechanism to resolve their deadlock. "The prosecutor's religious argument appears to have been just the balm needed for the pro-life jurors to assuage their consciences for returning a single death judgment." Petition, p. 15. Petitioner is incorrect.

Contrary to petitioner's claim, religious law and authority was not a factor considered in this jury's capital sentencing determination. Instead, the jury in this case was instructed to consider the evidence received during the penalty phase of the trial, the circumstances of the crime and the existence of any special circumstances found to be true, the presence or absence of criminal activity by appellant which involved the use of force or violence, the presence or absence of any prior felony convictions, whether or not the offense was committed under circumstances which appellant reasonably believed to be a moral justification or extenuation for his conduct, appellant's age at the time of the crime, and any other circumstance which extenuated the gravity of the crime. CT 1694-

1695. This Court can presume the jurors understood and followed the instruction which explained the factors to consider in determining the appropriate punishment. Francis v. Franklin, supra, 471 U.S. 307, 324, n. 9, 105 S.Ct. 1965, 85 L.Ed.2d 344.

In sum, the evidence of aggravation was compelling and the jury was clearly instructed that the arguments of counsel were not evidence. CT 1689. Respondent submits therefore that any error was harmless beyond a reasonable doubt. See Chapman v. California, supra, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705.[6/]

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6. Recently, in Sullivan v. Louisiana, supra, __ U.S. __ (June 1, 1993), the United States Supreme Court considered whether what it deemed "structural error" under Cage v. Louisiana, supra, 490 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339, could ever be amenable to a Chapman type harmless error analysis. Writing for the Court, Justice Scalia reasoned backward by first asking whether a harmless error analysis would be proper to assess a "structural error." He concluded that it would not be based on his view that it was impossible "to hypothesize a guilty verdict that was never in fact rendered - no matter how inescapable the findings that support the verdict might be . . ." But the foregoing language related solely to error constituting a structural defect in the trial process, there the failure to adequately instruct the jury on reasonable doubt. Since the jury was never instructed properly on reasonable doubt, a fundamental requirement of a fair trial, Sullivan held that it was impossible to theorize what a jury would do if properly instructed on that doubt since entitlement to that instruction was itself the crucial right. However, this language has been recently misinterpreted by some legal scholars to apply to "non-structural errors" where it *is possible to hypothesize* a guilty verdict by removal of the offending evidence. (See People v. Mitchell Sims, __ Cal.4th __ (June 28, 1993), dissn. opn. by Mosk, J. [applied to violation of Miranda rights].) Those commentators erroneously read Sullivan to require that the reviewing court find that no constitutional error is harmless if it in any way *contributes* to the verdict. As shown above, this was clearly not the import of Sullivan.

Finally, petitioner contends the California Supreme Court's affirmance rate since 1990 demonstrates a pervasive abdication of its responsibility to conduct constitutionally adequate harmless error review. Petition. pp. 16-25. Petitioner's contention is without merit.

Whatever deficiencies there may have been in the California Supreme Court's review of other capital cases are irrelevant to the instant determination. If the California Supreme Court has properly decided the issues before it in this case, that ends the matter. Respondent notes in general defense to the California Supreme Court, however, that any constitutional infirmities in the handling of other capital cases by that court were all susceptible to certiorari review by this Court, and respondent is unaware of any grant of certiorari in a California capital case on a question of the adequacy of appellate review.

In addition, as argued above, the California Supreme Court correctly engaged in the harmless error review of a state law error which did not amount to a federal constitutional violation. Petitioner is entitled to nothing more.

CONCLUSION

Since the California Supreme Court fairly decided this case in accord with the decisions of this Court, the petition for writ of certiorari should be denied.

Dated: July 14, 1993

Respectfully submitted,

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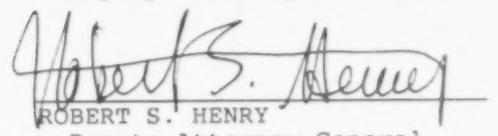

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No. 92-9049

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ALFRED ARTHUR SANDOVAL,
Petitioner,

v.

CALIFORNIA
Respondent.

On Writ of Certiorari to the Supreme Court of California

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 10, 1993
CERTIORARI GRANTED SEPTEMBER 28, 1993

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TABLE OF CONTENTS

	Page
RELEVANT DOCKET ENTRIES	1
EXCERPTS FROM JURY VOIR DIRE	2
CONFERENCE REGARDING INSTRUCTIONS	36
JURY INSTRUCTIONS GIVEN AT GUILT PHASE	38
EXCERPTS FROM COUNSELS' ARGUMENTS TO THE JURY	68
REASONABLE DOUBT INSTRUCTIONS GIVEN AT PENALTY PHASE	93
OPINION OF THE SUPREME COURT OF CALIFORNIA, DECEMBER 14, 1992	95
ORDER OF SUPREME COURT OF CALIFORNIA DENYING REHEARING, FEBRUARY 10, 1993	150
ORDER OF SUPREME COURT OF THE UNITED STATES GRANTING CERTIORARI AND LEAVE TO PROCEED IN FORMA PAUPERIS, SEPTEMBER 28, 1993	151

RELEVANT DOCKET ENTRIES

July 8, 1985—Petitioner was arraigned in Los Angeles County Superior Court in case No. A70386 and charged with two counts of murder and one count of attempted murder occurring on October 13, 1984, and two additional counts of murder occurring on October 31, 1984. (See Clerk's Transcript, p. 539; hereinafter "CT").

December 3, 1986—The prosecution began its case and rested on December 22. The defense case concluded on January 20, 1987, and all parties rested on January 26 (CT 1457).

February 10, 1987—The jury began deliberating on February 10, and returned guilty verdicts relating to the October 13, 1984 charges (CT 1496-1497). On February 23, the jury returned guilty verdicts on the October 31, 1984 charges (CT 1671).

March 2, 1987—Penalty trial began, and the case was submitted to the jury on March 12. On March 18, the jury declared an even deadlock (CT 1681). The court directed deliberations to continue, and on March 19, the jury returned life verdicts on counts 1 through 3, and a single death verdict on count 4 (CT 1733).

December 14, 1992—The California Supreme Court affirmed petitioner's convictions and judgment of death.

February 10, 1993—The California Supreme Court denied petitioner' petition for rehearing.

SUPERIOR COURT OF LOS ANGELES COUNTY

No. A760386

THE PEOPLE OF CALIFORNIA

v.

ALFRED ARTHUR SANDOVAL

EXCERPTS FROM JURY VOIR DIRE

* * * *

[1744] First is the burden of proof in a criminal case. For those of you who have sat on a civil case, I want you to immediately, if not sooner, forget the burden of proof. The burden of proof is as follows in a criminal case:

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all of the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

Every person who testifies under oath or affirmation is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.

* * * *

[1756] PROSPECTIVE JUROR YONEKURA: Are you still—let's see, on me? No, it doesn't. I know what I discussed earlier three weeks ago and I know what I said. But I'd still have a clear mind and I am keeping things separate to where I don't have like a prejudgment on how I feel. And it's not going to affect the case.

MR. APPLEBAUM: Okay. Now you haven't heard any evidence in this case?

PROSPECTIVE JUROR YONEKURA: Right.

MR. APPLEBAUM: Nobody has come up and sat in the chair behind Miss Hall here?

PROSPECTIVE JUROR YONEKURA: That's right.

MR. APPLEBAUM: The Court read a couple of preliminary instructions on presumption. If I asked you to vote right now in terms of guilt or innocence, what would you do? How would you vote?

PROSPECTIVE JUROR YONEKURA: I don't think I could decide.

MR. APPLEBAUM: Okay. That's an interesting thing. And I think that's a very common thing, "I can't decide because I haven't heard anything."

PROSPECTIVE JUROR YONEKURA: Right.

MR. APPLEBAUM: Remember what the Court said? There is a presumption of innocence. Mr. Sandoval is presumed to be innocent?

PROSPECTIVE JUROR YONEKURA: Yes.

MR. APPLEBAUM: Okay. But by your saying "I can't [1757] vote right now. I can't decide because I haven't heard anything," what you are telling me is in your gut that you are not feeling that presumption. Can you put your mind and your heart and your feeling and cloth Mr. Sandoval right now and presume him to truly be innocent? You have heard no evidence.

PROSPECTIVE JUROR YONEKURA: Yes, possibly, yes.

MR. APPLEBAUM: Possibly? It's a little hard, isn't it? You are shaking your head up and down. I assume that means yes?

PROSPECTIVE JUROR YONEKURA: Yes.

MR. APPLEBAUM: Why is that hard?

PROSPECTIVE JUROR YONEKURA: Because you are just taking his word for it. You know, without hearing any evidence.

MR. APPLEBAUM: But the burden of proof is on the prosecutor.

PROSPECTIVE JUROR YONEKURA: Yes.

MR. APPLEBAUM: You know there is the State all the might and majesty of the State of California?

PROSPECTIVE JUROR YONEKURA: Right.

PROSPECTIVE JUROR ARANGIO: May I say something?

MR. APPLEBAUM: Sure.

PROSPECTIVE JUROR ARANGIO: If there wasn't a question, he wouldn't be here. And I think that's what she's trying to say.

MR. APPLEBAUM: Is that what you are feeling?

PROSPECTIVE JUROR YONEKURA: Yes.

[1758] MR. APPLEBAUM: You have some questions in your mind. There is the old saying where there is smoke, there is fire?

PROSPECTIVE JUROR YONEKURA: Right.

MR. APPLEBAUM: And the reality is that you don't really presume him in your mind and your heart to be innocent right now?

PROSPECTIVE JUROR YONEKURA Right.

MR. APPLEBAUM: There is some nagging doubts, right?

PROSPECTIVE JUROR YONEKURA: Yes.

MR. APPLEBAUM: Does anybody have any different feeling? I mean that's real human life feelings. I understand that. Anyone feel any different than that? Really presume Mr. Sandoval to be innocent right now?

Mr. Khan, how do you feel about that?

PROSPECTIVE JUROR KHAN: I try to go on the feeling of him being innocent right now because he is innocent until he is proven guilty. And I haven't heard anything proving him guilty, so I assume he is innocent.

MR. APPLEBAUM: But you understand where Miss Yonekura is coming from?

PROSPECTIVE JUROR KHAN: I understand where she is coming from, yes.

MR. APPLEBAUM: Where there is smoke, there is fire. He got arrested.

PROSPECTIVE JUROR KHAN: Well, lot of people be arrested and be innocent.

[1759] MR. APPLEBAUM: Does anyone have any feeling about that that sometimes mistakes are made?

Mr. Carlson, how do you feel about that?

PROSPECTIVE JUROR CARLSON: I assume they are made, yes. But I couldn't make a decision one way or another the way I sit right now.

MR. APPLEBAUM: So if I asked you to vote right now in his terms of guilt or innocence, you'd just throw your hands up and say "I couldn't do it"?

PROSPECTIVE JUROR CARLSON: I wouldn't vote period.

MR. APPLEBAUM: I think that's a fair and honest answer. This is the time to tell the truth. The reality of what I am asking you to do is very difficult. We can say we agree with the presumption of innocence as an idea, as an intellectual idea, but it's hard to feel it down here, isn't it? Truly?

PROSPECTIVE JUROR CARLSON: What I believe is what the judge said. You have to prove him innocent or guilty. Until that happens, I couldn't make a—

MR. APPLEBAUM: That brings me to another interesting thing. You hear some interesting things when we start talking about this stuff that you can't make a decision until Mr. Milton proves him guilty or I prove him innocent, in effect. Okay.

That brings us back again to what the Court read earlier. This burden of proof is only on the prosecution. Think about this for a second, in terms of an individual being charged by the State and the weight of [1760] that. It's up to the State to prove a person guilty, if they can, beyond a reasonable doubt. Okay? I don't have any

burden of proving innocence. Mr. Sandoval is presumed to be innocent like we all are.

I mean, this is is not something that's unique to Mr. Sandoval. Would you agree with that that everybody is clothed, that if we were charged on a traffic ticket or something. We are all clothed with a presumption of innocence?

PROSPECTIVE JUROR CARLSON: I would hope so, yes. But we're talking my feeling. And like I wouldn't or couldn't vote.

MR. APPLEBAUM: Okay. Now what I am trying to do is bring your feelings up to where you can feel them and touch them and start playing with them and then say okay, now I have intellectualized my feelings and I can take them and put them on the shelf and really put my mind in a condition that I can truly say that I feel that the State has the burden of proving each and every element of these charges beyond a reasonable doubt. And if they can't do that, then I would vote not guilty.

You see what I am saying?

PROSPECTIVE JUROR CARLSON: Yes.

MR. APPLEBAUM: That's what the real burden is. And it's a high burden. Criminal law has the burden of reasonable doubt which is the highest burden in all of law. We won't get into the definitions right now because we can define it all we want. It's really what you feel. [1761] But in civil cases where we talk about money, it's less. You know, it flops over the middle, basically. This is almost true certainty—

MR. MILTON: There is an objection to that characterization. The Court has given the definition of prove beyond a reasonable doubt.

THE COURT: Objection sustained. As I have told you what reasonable doubt is and you are to assume that it is what it is.

MR. APPLEBAUM: It's an abiding conviction to a moral certainty of the truth of the charges. An abiding conviction is something that stays with—

THE COURT: Mr. Applebaum, perhaps you can ask the questions rather than deliver a narrative or lecture.

MR. APPLEBAUM: Mr. Carlson, in terms of your feelings, do you think that you could really now try to put aside this gut feeling that you have and deal with this presumption of innocence and make the State prove their case if they can?

PROSPECTIVE JUROR CARLSON: I heard the Judge's instructions, but I still say I couldn't vote at this time guilty or not guilty.

MR. APPLEBAUM: Okay. If I told you that again the law would say—let me rephrase it.

Let's assume that the State put on the case. You heard witnesses now, okay? And you felt after listening to these witnesses that Mr. Milton did not prove his case beyond a reasonable doubt. Some elements were [1762] not proven. You didn't believe some of the witnesses, whatever, okay? Defense looked at the situation and said "I am not going to put any witnesses on. We don't think the State made their case either."

Would you then vote in a situation like that?

PROSPECTIVE JUROR CARLSON: If I didn't believe any of the witnesses, yes.

MR. APPLEBAUM: Sure, okay. And in a situation like that, I assume if you didn't believe the witnesses or didn't feel that the State proved their case, you'd vote for not guilty, right?

PROSPECTIVE JUROR CARLSON: Yes.

MR. APPLEBAUM: Same thing occurring right here. We're starting out with that presumption. Fair enough?

PROSPECTIVE JUROR CARLSON: Uh-huh.

MR. APPLEBAUM: Can you accept that?

PROSPECTIVE JUROR CARLSON: Well, I don't know what I am accepting. I made a statement. I can't change it. At this time can I couldn't vote.

MR. APPLEBAUM: Intellectually you can accept it; emotionally you can't?

PROSPECTIVE JUROR CARLSON: That's right.

MR. APPLEBAUM: All right. That's fair enough. That's what we're here for.

Mr. Brown, how about you. Can you accept that idea?

PROSPECTIVE JUROR BROWN: Which idea are you referring to?

[1763] MR. APPLEBAUM: Just presumption of innocence.

PROSPECTIVE JUROR BROWN: Yes, because that's the law. However, you sort of re-defined the law by bringing in our bias.

MR. APPLEBAUM: Well, I am talking about your real feelings now. There is smoke and fire?

PROSPECTIVE JUROR BROWN: I know what the law is. I could vote innocent at this juncture.

MR. APPLEBAUM: Okay. How about what Miss Yonekura said, the idea of some bias?

PROSPECTIVE JUROR BROWN: Well, you have defined that we all have our biases. We are all ethnocentric. This is ability in bias and that's what you're talking about. Now in that frame of reference, you are putting another definition on it.

MR. APPLEBAUM: Okay. How do you feel about that, though, using your personal feelings? I am talking about you?

PROSPECTIVE JUROR BROWN: I wouldn't have any trouble in setting aside. Now you are talking about at this juncture before we heard any evidence. So by definition, he has to be innocent.

MR. APPLEBAUM: Okay. Now in terms of smoke and fire, though, in terms of your gut reaction, let's take the law aside now and talk about Don Brown and what's going on inside of Don Brown?

PROSPECTIVE JUROR BROWN: We're used to setting this aside. We have to.

[1764] MR. APPLEBAUM: It's important to do that.

PROSPECTIVE JUROR BROWN: Yes, it's important. I feel it's very important.

MR. APPLEBAUM: Do any one of my nine folks to the right here feel that you cannot set aside this kind

of gut reaction that really we all have? I mean that's reality. Mr. Arangio?

PROSPECTIVE JUROR ARANGIO: Of course.

MR. APPLEBAUM: Miss Yonekura, you voiced that you still have it. You think you can set it aside?

PROSPECTIVE JUROR YONEKURA: I think I can, yes.

MR. APPLEBAUM: Mr. Torzon?

PROSPECTIVE JUROR TORZON: I am sure.

MR. APPLEBAUM: Mr. Khan?

PROSPECTIVE JUROR KHAN: Yes.

MR. APPLEBAUM: Mr. Alexander?

PROSPECTIVE JUROR ALEXANDER: Yes.

MR. APPLEBAUM: Mr. Brown and Mr. Carlson I have already dealt with. Mrs. Fahnestock?

PROSPECTIVE JUROR FAHNESTOCK: Yes, I assume. And I believe the fact that the defendant is innocent at this point.

MR. APPLEBAUM: Okay. You'd require the State to prove their case beyond a reasonable doubt if they can do that?

PROSPECTIVE JUROR FAHNESTOCK: Yes.

MR. APPLEBAUM: Would you hold Mrs. Kopple and myself and Mr. Sandoval to any burden of proving his [1765] innocence at all?

PROSPECTIVE JUROR FAHNESTOCK: That's not within the law, no.

MR. APPLEBAUM: Okay. And last but not least, Mr. Flood. How do you feel about it?

PROSPECTIVE JUROR FLOOD: The burden is on the prosecutor and the man is innocent until proven guilty. That's all there is to it.

MR. APPLEBAUM: And emotionally?

PROSPECTIVE JUROR FLOOD: Emotionally, there really are not too many emotions, really. The man is innocent and things may change during the trial because of evidence and witnesses or whatever. But going to have to prove it to me.

MR. APPLEBAUM: While I have you and Miss Yonekura, I have never had this situation where two people work together one one jury. It's unusual out of a county this size to plunk two people down like that.

How do you feel about that, Miss Yonekura, that you being on a jury with a co-employee? You think that would—

PROSPECTIVE JUROR YONEKURA: I work on days and he works at night. We don't see each other.

MR. APPLEBAUM: Okay. Ships in the night passing?

PROSPECTIVE JUROR YONEKURA: Yes.

MR. APPLEBAUM: The fact that your shifts may change or something that you do work for the—

PROSPECTIVE JUROR YONEKURA: We work in a different [1766] unit. We work in the same unit, but different supervisors. I am on a different floor than he is. We don't see each other.

MR. APPLEBAUM: So you don't feel that that would affect you?

PROSPECTIVE JUROR YONEKURA: No.

MR. APPLEBAUM: How about you, Mr. Flood?

PROSPECTIVE JUROR FLOOD: Not at all. I seldom see Ginger at all.

MR. APPLEBAUM: Mr. Flood, you have lived in several foreign countries under different laws, in effect. We in this country, as you well know, have only two verdicts that you can come in with, either guilty or not guilty, acquittal or guilty, in effect.

In Scottland, for example, there is guilty, not guilty and not proven. And you see the difference with those three?

PROSPECTIVE JUROR FLOOD: Yes.

MR. APPLEBAUM: In this country we would lump in not proven and not guilty into one super category. Would you again hold the State to that type of verdict?

PROSPECTIVE JUROR FLOOD: Yes.

MR. APPLEBAUM: You have any problems with that?

PROSPECTIVE JUROR FLOOD: No problem.

MR. APPLEBAUM: Does anyone else have any difficulty with that concept? That not proven means the same thing as not guilty.

Do any of you nine ladies and gentlemen feel [1767] that in a case like this—you know, you read a lot in the newspapers about homicides in this town. You read a lot about "Gee, I don't know, gang violence, all kinds of violence, that if you felt that the state did not prove their case, each and every element of their case beyond a reasonable doubt that you'd have any difficulty going back and talking to your neighbors and friends and family and saying I voted not guilty in a homicide case? I mean there are subtle pressures put on sometimes.

Mr. Arangio, I see your head?

PROSPECTIVE JUROR ARANGIO: We're supposed to come to a decision and make that decision without a reasonable doubt and that would be my decision. I wouldn't have any doubt.

MR. APPLEBAUM: You are not worried about having to explain things to people?

PROSPECTIVE JUROR ARANGIO: No, I don't worry about things like that.

MR. APPLEBAUM: They are not here listening to evidence. You are, right?

PROSPECTIVE JUROR ARANGIO: Right.

MR. APPLEBAUM: But the reality is sometimes you know for a fact your friends, neighbors and families are going to asking you about it?

PROSPECTIVE JUROR FLOOD: Sure, if I get on the case.

* * * *

[1935] Jurors are beginning to become visibly bored. And I realize that in spite of that, you have a job to do. But every question is proceeded by a lengthy preamble which could be substantially shortened and focused for the juror.

Those are my comments. Your request for challenge or cause is denied.

(Bench conference concluded.)

THE COURT: Mr. Milton.

MR. MILTON: Thank you, Your Honor.

Good morning, ladies and gentlemen of the jury. My questions to you will be brief. I will move through them as quickly as I possibly can. I don't want you to get the impression that there is something missing or I am somehow disadvantaged because I ask less questions than my counterparts, because I want to ask those types of questions that I believe will determine your suitability for this type of a case.

I will begin with Mrs. Lewis. Mrs. Lewis, the standard of proof in a criminal case, proof beyond a reasonable doubt. Did you read that in the juror's handbook?

PROSPECTIVE JUROR LEWIS: I didn't really read it. Since I have been on jury duty before.

MR. MILTON: Have you ever heard that? You have heard the standard then in the prior case?

PROSPECTIVE JUROR LEWIS: Right.

MR. MILTON: And the Court has instructed you as to [1936] what that means?

PROSPECTIVE JUROR LEWIS: Right.

MR. MILTON: Will you, to the best of your ability, apply that standard of proof in this case?

PROSPECTIVE JUROR LEWIS: I certainly will.

MR. MILTON: At the conclusion of this case, if you are persuaded beyond a reasonable doubt that the defendant committed these offenses and the offenses were proven, would you find him guilty?

PROSPECTIVE JUROR LEWIS: Yes, sir, if it was shown to me that the evidence showed that he was guilty, I could find him.

MR. MILTON: If you were persuaded beyond a reasonable doubt that the offenses had been committed and the defendant is the one who committed them, and you were persuaded beyond a reasonable doubt you have to find him guilty. Do you understand that?

PROSPECTIVE JUROR LEWIS: Right, right.

MR. MILTON: Can you think of any reason—well, let me ask you this. Is there anything that we ought to know about you?

PROSPECTIVE JUROR LEWIS: No. You have asked all the questions.

MR. MILTON: Is there anything that you'd like to discuss that we've discussed so far?

PROSPECTIVE JUROR LEWIS: No.

MR. MILTON: No question about your function as a trial juror?

[1937] PROSPECTIVE JUROR LEWIS: No.

MR. MILTON: You willing to accept His Honor's instruction as it is absolutely?

PROSPECTIVE JUROR LEWIS: Yes.

MR. MILTON: And you are willing to accept your responsibility as a trial juror to fairly and accurately determine the facts of this case?

PROSPECTIVE JUROR LEWIS: Yes, sir.

MR. MILTON: Will you, to the best of your ability, carefully analyze the facts of this case and apply the law that the judge gives you to those facts?

PROSPECTIVE JUROR LEWIS: I sure will.

MR. MILTON: Mr. Lin, is there anything that you would like to discuss that we've discussed so far?

PROSPECTIVE JUROR LIN: No.

MR. MILTON: You think you understand what your function would be as a trial juror in this case?

PROSPECTIVE JUROR LIN: Yes, I do.

MR. MILTON: As you understand the standard of proof, proof beyond a reasonable doubt?

PROSPECTIVE JUROR LIN: Yes.

MR. MILTON: Are you willing to apply that standard in this case?

PROSPECTIVE JUROR LIN: Yes.

MR. MILTON: At the conclusion of this case, if you are persuaded beyond a reasonable doubt that this defendant committed these murders, would you find him guilty?

[1938] PROSPECTIVE JUROR LIN: Yes.

MR MILTON: Will you give this case your best effort, your full attention and carefully analyze the facts of this case and apply the law that the judge gives you to those facts?

PROSPECTIVE JUROR LIN: Yes.

MR. MILTON: Whether you agree with His Honor's instructions or not, you will follow them absolutely?

PROSPECTIVE JUROR LIN: Yes, I will.

MR. MILTON: Mrs. Santana, is there anything that you would like to discuss that we've discussed so far?

PROSPECTIVE JUROR SANTANA: No.

MR. MILTON: Do you think you understand what your function would be as a trial juror?

PROSPECTIVE JUROR SANTANA: Yes.

MR. MILTON: If at the conclusion of this case you were persuaded beyond a reasonable doubt that the defendant committed these offenses, would you find him guilty?

PROSPECTIVE JUROR SANTANA: Yes.

MR. MILTON: Do you understand that if you were persuaded beyond a reasonable doubt, and I don't mean the other jurors, if you at the conclusion of this case were convinced beyond a reasonable doubt that this defendant committed these murders, you'd have to find him guilty. Do you understand that?

PROSPECTIVE JUROR SANTANA: Yes.

MR. MILTON: Will you give this case your full [1939] attention, your best effort and watch every person who takes that stand that testifies, listen very carefully to what he or she has to say, including that person's demeanor and considering that person's motive or interest or bias or any other thing the Court instructs you to consider when you are determining the believability of that witness?

PROSPECTIVE JUROR SANTANA: Yes.

MR. MILTON: Mr. Flood, is there anything that you would like to discuss that we've discussed so far?

PROSPECTIVE JUROR FLOOD: No.

MR. MILTON: You think you understand what your function would be as a trial juror in this case?

PROSPECTIVE JUROR FLOOD: Yes.

MR. MILTON: And there has been discussion about the defendant taking the stand or not taking the stand. The defense has said repeatedly that they don't have to do anything. Do you realize, Mr. Flood, that if they do not do anything and the evidence is such a state that it convinces you beyond a reasonable doubt that the defendant committed these offenses, you'd have to find him guilty?

PROSPECTIVE JUROR FLOOD: Yes.

MR. MILTON: So it doesn't matter what they do. If you—the bottom line is are persuaded beyond a reasonable doubt the truth of the charges and that the defendant is responsible for them, you'd have to find him guilty?

PROSPECTIVE JUROR FLOOD: Yes.

[1940] MR. MILTON: There has been a lot of discussion with regard to a situation of one juror disagreeing with the others in the jury room and—well, let me ask you this. Let's assume it's 11 to one. You are the one that disagrees with the others. Don't you agree that merely because the other 11 disagree with you, you wouldn't change your mind, would you, out of embarrassment or something like that, would you?

PROSPECTIVE JUROR FLOOD: No.

MR. MILTON: Nor would you just stick with it because you have made that commitment and would be embarrasing for you to stick with it. Wouldn't you listen

to further deliberation and if they were ab'e to convince you where you were wrong, you wou'd change your mind.

On the other hand, if they were unable to convince you where you were wrong, you would remain with your original position?

PROSPECTIVE JUROR FLOOD: Yes.

MR. MILTON: The standard of proof, Mr. Flood, proof beyond a reasonable doubt, the Court has given you that instruction before and he will give it to you at the conclusion of this case. Do you think you understand that standard of proof?

PROSPECTIVE JUROR FLOOD: Yes.

MR. MILTON: Are you willing to apply it in this case?

PROSPECTIVE JUROR FLOOD: Yes.

MR. MILTON: If, at the conclusion of this case, [1941] you are persuaded beyond a reasonab'e doubt that this defendant committed those murders, would you find him guilty?

PROSPECTIVE JUROR FLOOD: Yes.

MR. MILTON: Mrs. Fahnestock?

PROSPECTIVE JUROR FAHNESTOCK: Yes.

MR. MILTON: Mrs. Fahnestock, is there anything that you would like to discuss that we've discussed so far?

PROSPECTIVE JUROR FAHNESTOCK: No.

MR. MILTON: Do you think you understand what your function would be as a trial juror?

PROSPECTIVE JUROR FAHNESTOCK: Yes, I do.

MR. MILTON: The standard of proof, proof beyond a reasonable doubt, do you think you understand what that means?

PROSPECTIVE JUROR FAHNESTOCK: I believe I do.

MR. MILTON: Are you willing to apply that standard in this case to the best of your ability?

PROSPECTIVE JUROR FAHNESTOCK: Yes.

MR. MILTON: Will you give this case your full attention, your best effort and carefully analyze the facts

of this case and apply the law that the judge gives you to the facts as you determine the facts to be?

PROSPECTIVE JUROR FAHNESTOCK: I will.

MR. MILTON: If, at the conclusion of this case, you are persuaded beyond a reasonable doubt that this defendant committed these offenses, would you find him [1942] guilty?

PROSPECTIVE JUROR FAHNESTOCK: Yes, I would.

MR. MILTON: Mrs. Fahnestock, there have been comments with regard to transactions being separate, treating them completely separate. The facts in this case might indicate that that may not be so. His Honor's instructions may tell you to do otherwise. Will you promise that you will follow his instructions and not something that some lawyer is telling you that you should do?

MS. KOPPLE: Objection. A narrative.

THE COURT: Overruled.

MR. MILTON: Would you do that?

PROSPECTIVE JUROR FAHNESTOCK: Yes.

MR. MILTON: I call it lawyer talk from anybody. The lawyer talk is not important. It's the facts that you determine the facts to be and His Honor's instructions. Do you agree?

PROSPECTIVE JUROR FAHNESTOCK: Yes, that is. Yes.

MR. MILTON: Mr. Carlson?

PROSPECTIVE JUROR CARLSON: Yes.

MR. MILTON: Do you understand what your function would be as a trial juror?

PROSPECTIVE JUROR CARLSON: Yes.

MR. MILTON: There have been comments and suggestions from certain questions by Mr. Applebaum and Mrs. Kopple about a number of things, self defense, alibi, PCP, snitches, informants. I am not here to try to try [1943] this case during this voir dire of this jury selection process. Those things that have been suggested doesn't

necessarily mean that they are true. Do you understand that, Mr. Carlson?

MS. KOPPLE: Objection.

THE COURT: Overruled.

PROSPECTIVE JUROR CARLSON: Yes, I do.

MR. MILTON: You will determine what the facts are. If self defense exists or doesn't exist, you will determine that. Do you understand that?

PROSPECTIVE JUROR CARLSON: Yes.

MR. MILTON: Are you willing to do that?

PROSPECTIVE JUROR CARLSON: Yes.

MR. MILTON: The standard of proof, proof beyond a reasonable doubt, are you willing to apply that in this case?

PROSPECTIVE JUROR CARLSON: Yes.

MR. MILTON: If, at the conclusion of this case, you believe beyond a reasonable doubt that this defendant committed these murders, would you find him guilty of them?

PROSPECTIVE JUROR CARLSON: Yes.

MR. MILTON: Mr. Carlson, will you give this case your best effort, your full attention and carefully analyze the facts of this case and apply the law that His Honor gives you to those facts?

PROSPECTIVE JUROR CARLSON: Yes.

MR. MILTON: Mrs. Lopez. Mrs. Lopez, is there [1944] anything that you would like to discuss that we've discussed so far of something that you might not understand with regard to your function?

PROSPECTIVE JUROR LOPEZ: No.

MR. MILTON: The standard of proof, proof beyond a reasonable doubt. Are you willing to the best of your ability to try to apply that standard in this case?

PROSPECTIVE JUROR LOPEZ: Yes.

MR. MILTON: If you were persuaded at the conclusion of this case that this defendant committed these offenses beyond a reasonable doubt, would you find him guilty of them?

PROSPECTIVE JUROR LOPEZ: Yes.

MR. MILTON: Mr. Lumas, you have any questions with regard to your function as a trial juror?

PROSPECTIVE JUROR LUMAS: No.

MR. MILTON: The standard of proof, proof beyond a reasonable doubt, are you willing to apply that in this case to the best of your ability?

PROSPECTIVE JUROR LUMAS: Yes.

MR. MILTON: If you are persuaded beyond a reasonable doubt that the defendant committed these offenses, whether they put on any defense, whether they rest, all those scenarios that they've raised, whatever they do or don't do, if at the conclusion of this case you believe beyond a reasonable doubt that this defendant committed these murders, you'd find him guilty, wouldn't you?

[1945] PROSPECTIVE JUROR LUMAS: Yes, sir.

MR. MILTON: Mrs. Folger, is there anything that you would like to discuss that we've discussed so far?

PROSPECTIVE JUROR FOLGER: No.

MR. MILTON: The standard of proof, proof beyond a reasonable doubt, are you willing to apply it in this case?

PROSPECTIVE JUROR FOLGER: Yes, I am.

MR. MILTON: If, at the conclusion of this case, you are persuaded beyond a reasonable doubt that the defendant committed these offenses, would you find him guilty?

PROSPECTIVE JUROR FOLGER: Yes.

MR. MILTON: Would you give this case your full attention, your best effort and carefully analyze the facts of this case and apply the law that the judge gives you to those facts?

PROSPECTIVE JUROR FOLGER: Yes.

MR. MILTON: Mr. Brown, is there anything that you would like to discuss that we've discussed so far?

PROSPECTIVE JUROR BROWN: No.

MR. MILTON: Is the standard of proof, proof beyond a reasonable doubt, are you willing to apply it in this case?

PROSPECTIVE JUROR BROWN: Yes.

MR. MILTON: If you are persuaded beyond a reasonable doubt that the defendant committed these offenses, would you find him guilty?

[1946] PROSPECTIVE JUROR BROWN: Yes.

MR. MILTON: Irrespective of any feeling you might have to sympathize with him or anything like that?

PROSPECTIVE JUROR BROWN: Yes.

MR. MILTON: Can you give this case your best effort, your full attention and carefully analyze the facts of this case and apply the law that the judge gives you to those facts?

PROSPECTIVE JUROR BROWN: That would be difficult.

MR. MILTON: What do you mean, sir?

PROSPECTIVE JUROR BROWN: Because of my other responsibilities I have. I have mentioned that I am in a graduate research program and I have a timetable in that. That would be drawing my attention also.

MR. MILTON: Let me ask you this, Mr. Brown. We predicted an outside limit of like six months in the beginning. What if I were to tell you it would be substantially shorter than that? Would that affect your opinion at all?

PROSPECTIVE JUROR BROWN: By opinion, do you mean my willingness to be a juror?

MR. MILTON: Yes, or your ability to fairly—

PROSPECTIVE JUROR BROWN: Yes, it would affect it.

MR. MILTON: So the shorter the time then, the less pressed you would be?

PROSPECTIVE JUROR BROWN: Yes, yes.

MR. MILTON: You would give this case your full attention?

[1947] PROSPECTIVE JUROR BROWN: Yes.

MR. MILTON: Mr. Alexander, you think you understand what your function would be as a trial juror if you are selected to hear this case?

PROSPECTIVE JUROR ALEXANDER: Yes.

MR. MILTON: Are you willing to apply the standard of proof, proof beyond a reasonable doubt?

PROSPECTIVE JUROR ALEXANDER: Yes.

MR. MILTON: If, at the conclusion of this case, you are persuaded beyond a reasonable doubt that this defendant committed these murders, would you find him guilty of them?

PROSPECTIVE JUROR ALEXANDER: Yes.

MR. MILTON: Mr. Khan, the standard of proof, proof beyond a reasonable doubt, are you willing to apply it in this case?

PROSPECTIVE JUROR KHAN: Yes.

MR. MILTON: Would you find the defendant guilty of these murders if you believed beyond a reasonable doubt that he was guilty of them?

PROSPECTIVE JUROR KHAN: Yes.

MR. MILTON: Is there any question in your mind about that?

PROSPECTIVE JUROR KHAN: No.

MR. MILTON: On the other hand, and I am not trying to suggest by the questions anything, but on the other hand if the people failed to meet that burden, you'd have to find him not guilty, right?

[1948] PROSPECTIVE JUROR KHAN: Yeah.

MR. MILTON: The people meet the burden, you'd have to find him guilty?

PROSPECTIVE JUROR KHAN: The evidence proves him guilty, I will find him guilty. If not, I won't.

MR. MILTON: Can you give this case your full attention, your best effort and carefully analyze the facts of this case and apply the law that the judge gives you to those facts?

PROSPECTIVE JUROR KHAN: Yes.

MR. MILTON: Can you think of any reason why you would not be suitable for this type of a case, Mr. Khan?

PROSPECTIVE JUROR KHAN: No.

MR. MILTON: Mrs. Fintz?

PROSPECTIVE JUROR FINTZ: Yes.

MR. MILTON: Same question. The standard of proof. Are you willing to apply it in this case?

PROSPECTIVE JUROR FINTZ: Yes.

MR. MILTON: You think you understand your function as a trial juror?

PROSPECTIVE JUROR FINTZ: Yes.

MR. MILTON: If you are persuaded beyond a reasonable doubt that the defendant committed these murders, would you find him guilty of them?

PROSPECTIVE JUROR FINTZ: Yes.

MR. MILTON: Mrs. Camberos, have you ever heard the standard of proof before, proof beyond a reasonable doubt?

PROSPECTIVE JUROR CAMBEROS: Yes.

[1949] MR. MILTON: Before coming to court?

PROSPECTIVE JUROR CAMBEROS: Yes.

MR. MILTON: Did you read about it in the juror's handbook?

PROSPECTIVE JUROR CAMBEROS: No.

MR. MILTON: Some other source?

PROSPECTIVE JUROR CAMBEROS: Yes, from other jury rooms I have been in.

MR. MILTON: The court read the instruction to you again yeseterday and he will read it again at the conclusion of this case. Do you think you have some idea as to what that means?

PROSPECTIVE JUROR CAMBEROS: No.

MR. MILTON: Proof beyond a reasonable doubt?

PROSPECTIVE JUROR CAMBEROS: I understand.

MR. MILTON: So you understand it fully, you believe?

PROSPECTIVE JUROR CAMBEROS: Yes.

MR. MILTON: Are you willing to apply that standard in this case?

PROSPECTIVE JUROR CAMBEROS: Yes.

MR. MILTON: If, at the conclusion of this case, and I want you to think about it, if at the conclusion of this case you believed beyond a reasonable doubt that this defendant committed these murders, would you find him guilty of them?

PROSPECTIVE JUROR CAMBEROS: Yes, I would.

MR. MILTON: Do you have any question about your [1950] function as a trial juror?

PROSPECTIVE JUROR CAMBEROS: No.

MR. MILTON: That's Miss Burtenshaw?

PROSPECTIVE JUROR BURTENSHAW: Uh-huh.

MR. MILTON: Miss Burtenshaw, do you have any question about your function as a trial juror?

PROSPECTIVE JUROR BURTENSHAW: No, I don't.

MR. MILTON: Are you willing to give this case your full attention, your best effort and carefully analyze the facts of this case and apply the law that the judge gives you to those facts?

PROSPECTIVE JUROR BURTENSHAW: Yes, I will.

MR. MILTON: The standard of proof, proof beyond a reasonable doubt, are you willing to apply it in this case?

PROSPECTIVE JUROR BURTENSHAW: Yes.

MR. MILTON: You are not sitting there thinking that you have a leaning a certain way because of certain things suggested by questions by counsel, do you?

PROSPECTIVE JUROR BURTENSHAW: No.

MR. MILTON: The fact that there is a lot of questions about two of them and one of me and I am a boy and they are grown and things like that—

MR. APPLEBAUM: I object to that, Your Honor. There has been no mention of that whatsoever. Mr. Milton's a grown man with children.

THE COURT: Overruled.

MR. MILTON: Mrs. Burtenshaw, the fact of the [1951] matter is if you are persuaded beyond a reasonable doubt that this defendant committed these murders, you'd find him guilty, wouldn't you?

PROSPECTIVE JUROR BURTENSHAW: Definitely.

MR. MILTON: Mr. Torzon, the standard of proof, prove beyond a reasonable doubt, are you willing to apply it in this case?

PROSPECTIVE JUROR TORZON: Yes, I am.

MR. MILTON: Are you willing to follow His Honor's instructions absolutely?

PROSPECTIVE JUROR TORZON: Yes.

MR. MILTON: Will you, to the best of your ability, carefully analyze the facts of this case and apply the law that the judge gives you to those facts?

PROSPECTIVE JUROR TORZON: Yes.

MR. MILTON: If, at the conclusion of this case, you are persuaded beyond a reasonable doubt that the defendant committed these offenses, would you find him guilty?

PROSPECTIVE JUROR TORZON: Yes.

MR. MILTON: That's Miss Yonekura?

PROSPECTIVE JUROR YONEKURA: Yes.

MR. MILTON: The standard of proof. Do you think you understand that proof beyond a reasonable doubt?

PROSPECTIVE JUROR YONEKURA: Yes.

MR. MILTON: You willing to apply it in this case?

PROSPECTIVE JUROR YONEKURA: Yes.

MR. MILTON: If, at the conclusion of this case, [1952] you are persuaded beyond a reasonable doubt that the defendant committed these murders, would you find him guilty of them?

PROSPECTIVE JUROR YONEKURA: Yes.

MR. MILTON: Mr. Arangio, do you have any questions regarding your function as a trial juror?

PROSPECTIVE JUROR ARANGIO: No, sir.

MR. MILTON: How about your suitability?

PROSPECTIVE JUROR ARANGIO: No, sir.

MR. MILTON: The standard of proof, proof beyond a reasonable doubt, are you willing to apply it in this case?

PROSPECTIVE JUROR ARANGIO: Yes, I am.

MR. MILTON: If you are persuaded beyond a reasonable doubt that this defendant committed these murders, would you find him guilty of them?

PROSPECTIVE JUROR ARANGIO: Yes, I would.

MR. MILTON: Pass for cause.

THE COURT: Except for the hearing at bench, do the defense pass for cause?

MR. APPLEBAUM: Yes, Your Honor.

MS. KOPPLE: Yes.

THE COURT: Peremptory is with the people.

MR. MILTON: People would like to thank and excuse juror number 7 Mrs. Lopez.

THE COURT: Mrs. Lopez, thank you very much for coming. You are excused. Please report back to the jury assembly room. And they will tell you what's next.

* * * *

[1963] PROSPECTIVE JUROR SEGOVIA: Right. All things can be taken into account, right.

MR. APPLEBAUM: We talked a lot about burdens of proof and reasonable doubt. And I think you have a pretty good feel for what we're talking about at this point.

But invariably what happens is after the case is over, a juror will come out and say gee, you didn't prove your client was innocent. And I wonder if I am talking to a wall sometimes, you know, not saying that here, but you just wonder about that.

You have any feelings about that that somehow the defense really has to prove anything to you?

PROSPECTIVE JUROR SEGOVIA: No. You don't have to prove to me that he is innocent. I understand that. As it stands now, he is.

MR. APPLEBAUM: Okay. You understand we're not starting out on equal footing here in the sense of right now?

PROSPECTIVE JUROR SEGOVIA: Then you—

MR. APPLEBAUM: The defense and the prosecution.

PROSPECTIVE JUROR SEGOVIA: Okay.

MR. APPLEBAUM: There is a presumption, the defense starts out with a presumption?

PROSPECTIVE JUROR SEGOVIA: Right.

MR. APPLEBAUM: The prosecution can whittle that away and then fill up their own side of proof beyond a reasonable doubt. You would accept that, certainly?

PROSPECTIVE JUROR SEGOVIA: Yes.

[1964] MR. APPLEBAUM: Fair enough?

PROSPECTIVE JUROR SEGOVIA: Fair enough.

MR. APPLEBAUM: You agree with what I stated when I said we don't start equally?

PROSPECTIVE JUROR SEGOVIA: Okay. I agree with it now.

MR. APPLEBAUM: People do sometimes hold some people to different standards. We talk about whether Mr. Sandoval will testify or not. You feel that you can hold his testimony to the same standard as any other witness in terms of evaluating him as if he does testify?

PROSPECTIVE JUROR SEGOVIA: Sure.

MR. APPLEBAUM: Now you have to evaluate bias. He is the guy sitting over here on trial. That's a bias, right?

PROSPECTIVE JUROR SEGOVIA: Right.

MR. APPLEBAUM: Let's talk real talk here. That's something you would consider, I am sure, wouldn't you?

PROSPECTIVE JUROR SEGOVIA: Yes.

MR. APPLEBAUM: Would you also consider if other witnesses testify in terms of biases that they have? Awards that they might be getting or reasons that they might have for fabricating?

PROSPECTIVE JUROR SEGOVIA: I can appreciate that also, yes.

MR. APPLEBAUM: Could you, I don't know, consider revenge even as a motive that a witness might have for fabricating something?

[1965] PROSPECTIVE JUROR SEGOVIA: Possible.

MR. APPLEBAUM: Now we talk about prosecution burden of proving things and you recall Mrs. Kopple talking about each and every element of the charge. Crimes are made up of component parts as we define them in the penal code, okay?

PROSPECTIVE JUROR SEGOVIA: Right.

MR. APPLEBAUM: And then there is also the other component part who did it?

PROSPECTIVE JUROR SEGOVIA: Right.

MR. APPLEBAUM: You agree that the prosecution has the burden of proving each and every one of those component parts beyond a reasonable doubt, right?

PROSPECTIVE JUROR SEGOVIA: I do.

MR. APPLEBAUM: There are in terms of defenses. Sometimes an act will occur and we all agree that it occurred, okay?

PROSPECTIVE JUROR SEGOVIA: Right.

MR. APPLEBAUM: It can be an excusable. Can you consider if the court instructs you that sometimes things are excusable or justifiable? Could you consider those types of instructions, and even though you know something occurred, take into account that it might be justified?

PROSPECTIVE JUROR SEGOVIA: Yes.

MR. APPLEBAUM: You wouldn't preclude that?

PROSPECTIVE JUROR SEGOVIA: Right.

MR. APPLEBAUM: Depends on what's said and how it's said?

* * * *

[2042] Do I presume that you didn't write no because you didn't know any of them or—

PROSPECTIVE JUROR JURAS: I don't know any of them.

MS. KOPPLE: Fine.

Do you have any difficulty with this presumption of innocence that as you sit there now Mr. Sandoval is presumed innocent?

PROSPECTIVE JUROR JURAS: I presume him to be innocent.

MS. KOPPLE: And you believe that right now?

PROSPECTIVE JUROR JURAS: Yes.

MS. KOPPLE: Now do you understand that that presumption is something that is kind of surrounding him and it's cloking him throughout this trial into the jury room into your deliberations?

PROSPECTIVE JUROR JURAS: Yes.

MS. KOPPLE: Do you understand that?

PROSPECTIVE JUROR JURAS: I understand that.

MS. KOPPLE: Will you agree to follow that concept?

PROSPECTIVE JUROR JURAS: Yes, I agree.

MS. KOPPLE: And will you require the district attorney in this case to meet his burden of proof, if he can do so?

PROSPECTIVE JUROR JURAS: I will require him to do so.

MS. KOPPLE: All right. And I want you to understand, do you accept the proposition that all you may hear in this case is from this side of the table and from [2043] cross-examination by us. That's a likely possibility?

PROSPECTIVE JUROR JURAS: Yes, I understand that.

MS. KOPPLE: And are you going to somehow despite the fact that you might want to hear what's over here on the other side of the table, are you going to hold it against Mr. Sandoval if you don't hear from him?

PROSPECTIVE JUROR JURAS: No.

MS. KOPPLE: You have never been on jury duty, right?

PROSPECTIVE JUROR JURAS: No, I never have.

MS. KOPPLE: I take it that you are the sort of person who will speak up and voice her opinion in front of other people?

PROSPECTIVE JUROR JURAS: Yes.

MS. KOPPLE: Is that a fair assumption?

PROSPECTIVE JUROR JURAS: That's a fair assumption.

MS. KOPPLE: And if you were on a jury deliberating and there were eleven people screaming at you that you were unreasonable and et cetera, et cetera and they were all going the other way, whichever way it was, are you the sort of person who will change over to get along with the group or if you really believed you are really correct in your opinion, what would you do?

PROSPECTIVE JUROR JURAS: If I had not been convinced to a moral certainty of the defendant's guilt, I would hang firm. And conversely, if I had been convinced that he were guilty, I would hang firm then, too.

MS. KOPPLE: Okay. Do you have any idea or any [2044] concept that you came into this courthouse with that if a prosecutor calls a witness that that witness must by the very nature of being called by the prosecutor have some extra air or credibility about him?

PROSPECTIVE JUROR JURAS: No.

MS. KOPPLE: Do you agree to judge all the witnesses by the same scale?

PROSPECTIVE JUROR JURAS: Yes.

MS. KOPPLE: If, for example, at the end of the prosecutor's case he rests, and then you hear us rest and then you have to go into the jury room and you know that there must be something more that you want to hear. You just have a gut feeling that maybe he is involved. Maybe he did it, but you didn't hear something to really convince you beyond a reasonable doubt and to a moral

certainty. Are you going to let that gut feeling or that intuition take over or will you require the rules of the court to be met?

PROSPECTIVE JUROR JURAS: I would require that the rules of the court be met and follow the judge's instructions. If I hadn't heard conclusive evidence, I couldn't find somebody guilty.

MS. KOPPLE: So you don't know anything about this case, do you?

PROSPECTIVE JUROR JURAS: No.

MS. KOPPLE: You could go either way depending on the evidence, right?

PROSPECTIVE JUROR JURAS: Right.

* * * *

[2047] MS. KOPPLE: But if you were ordered to do so as a juror and there were some photographs which may or may not occur in this, case would you be able to follow your duty as a juror and to look at the evidence?

PROSPECTIVE JUROR DONNELLY: Yes.

MS. KOPPLE: Is there anything about any of the questions that I have been asking or Mr. Milton had asked or Mr. Applebaum that lit up some light bulb in your head and said, you know, where you would like to ask a question or make a comment? Anything that was appropriate to you?

PROSPECTIVE JUROR DONNELLY: I don't think so. My answers would have been the same as most of these people.

MS. KOPPLE: And do you have any difficulty with this concept of reasonable doubt?

PROSPECTIVE JUROR DONNELLY: No.

MS. KOPPLE: Presumption of reasonable doubt?

PROSPECTIVE JUROR DONNELLY: No.

MS. KOPPLE: Do you think that there should be any difference, a different, say, burden on the prosecution when the charges get more serious? Like this type of case?

PROSPECTIVE JUROR DONNELLY: Yes, I think so.

MS. KOPPLE: Now when I ask that, in other words, there is a burden of proving a case beyond a reasonable doubt and to a moral certainty in each and every criminal case. That is the general burden the prosecutor has. You understand that?

PROSPECTIVE JUROR DONNELLY: Yes.

* * * *

[2056] MS. KOPPLE: Any reading or any stories in the paper that you might have read about it, that you can recall?

PROSPECTIVE JUROR MOORE: No.

MS. KOPPLE: You also did not answer yes or no on the names. It's just blanks. Did you know any of the names of any of the witnesses who were called or questioned?

PROSPECTIVE JUROR MOORE: No.

MS. KOPPLE: And if you had a choice to be here or not to be here as juror in this case, you did mark yes, that you would prefer to be here. Did you have any particular reason?

PROSPECTIVE JUROR MOORE: Just that I work at the Post Office and they do a lot of overtime during December. So I wanted to get out of overtime.

MS. KOPPLE: That's fair enough. I just want to know the answer. We get all kinds of responses, and I just want to know your answer.

Now would you have any difficulty in requiring the prosecutor to meet the burden of proof as prescribed by law?

In other words, to prove the truth of these charges beyond a reasonable doubt and to a moral certainty? Would you have any difficulty in doing that?

PROSPECTIVE JUROR MOORE: No.

MS. KOPPLE: And what if the following were to happen. Supposing he presents whatever he has. I don't [2057] know how many witnesses he will present or what

evidence he will present right now. But let's say there comes a time when he says the people rest and then Mr. Applebaum or I get up and say guess what? The defense rests. We decide to rest upon the state of his evidence.

Are you going to come in there with some kind of anything feeling that you didn't hear from the other side of the table and therefore you are going to convict?

PROSPECTIVE JUROR MOORE: No.

MS. KOPPLE: If, after he rested and we rested, you were not convinced beyond a reasonable doubt and to a moral certainty in your heart, would you be able to vote not guilty?

PROSPECTIVE JUROR MOORE: Yes.

MS. KOPPLE: Even though you might want to hear what Mr. Sandoval has to say, you accept the proposition that in many criminal cases you don't hear from the defendant?

PROSPECTIVE JUROR MOORE: Yes.

MS. KOPPLE: Since you would be here and not at the Post Office and you know that you get out at 2:30 every day, is there anything that would be pressing you to, say, come in with a quicker verdict or to press you for time if you were deliberating in the jury room?

PROSPECTIVE JUROR MOORE: No.

* * * *

[2207] MS. KOPPLE: When you look at Mr. Sandoval right now, do you think you can tell whether he is guilty or innocent?

PROSPECTIVE JUROR HARTNETT: No, I can't. Well, I presume he is innocent.

MS. KOPPLE: But just factually speaking, you look at him you don't know, do you?

PROSPECTIVE JUROR HARTNETT: No.

MS. KOPPLE: Now when we talk about the presumption of innocence, that's a legal presumption that everyone, including you and everyone else in this room has that you are legally presumed to be innocent until the contrary is proven beyond a reasonable doubt and to

a moral certainty. Does that sound appropriate to you or not appropriate?

PROSPECTIVE JUROR HARTNETT: That sounds appropriate.

MS. KOPPLE: So you don't have any difficulty with that concept?

PROSPECTIVE JUROR HARTNETT: No, I don't.

MS. KOPPLE: It seems I—well, you have been on jury duty several times in criminal cases, so I suppose you have heard about the burden of the prosecutor by me, Mr. Applebaum and in your other cases as well, correct?

PROSPECTIVE JUROR HARTNETT: Yes.

[2208] MS. KOPPLE: Do you think that there is anything wrong or unfair or too hard for this would be a one way street, that the ball is in Mr. Milton's court solely and that if he can't prove the truth of these charges, then you must come in with an acquittal?

PROSPECTIVE JUROR HARTNETT: No, I don't.

MS. KOPPLE: And will you be able to do that if that's what happens?

PROSPECTIVE JUROR HARTNETT: Yes, I can.

MS. KOPPLE: Thank you.

Pass for cause.

THE COURT: MR. MILTON.

MR. MILTON: Thank you, Your Honor.

Good morning, Mrs. Hartnett. I am sure you have heard the question by Ms. Kopple repeatedly if the people put on a case and people rest and the defense says the defense rests, whether or not you could find the defendant not guilty if the people fail to sustain their burden of proof and most of the jurors correctly stated yes, they could find him not guilty.

Conversely, Miss Hartnett, would you agree that if the people put on a case and the people rest and the defense says the defense rests, if you are persuaded beyond a reasonable doubt that the defendant committed these offenses, you'd have to find him guilty; would you not?

PROSPECTIVE JUROR HARTNETT: Yes, I would.

MR. MILTON: The standard of proof in a criminal [2209] case, proof beyond a reasonable doubt, do you think you understand what that means?

PROSPECTIVE JUROR HARTNETT: Yes, I do.

MR. MILTON: Are you willing to apply that standard in this case?

PROSPECTIVE JUROR HARTNETT: Yes.

MR. MILTON: If you are persuaded beyond a reasonable doubt that this defendant committed these murders, would you find him guilty of them?

PROSPECTIVE JUROR HARTNETT: Yes, I would.

MR. MILTON: And that is independently of anyone else on the panel. Do you understand that?

PROSPECTIVE JUROR HARTNETT: Yes, I do.

MR. MILTON: Now Miss Hartnett, we don't mean to try to get you to think that well, they want a hung jury, something like that or stick to your guns no matter what the others say.

The court will instruct you with regard to your duty during deliberation. The fact that even if you commit yourself one way or the other, whatever that way is, if you believe at sometime during further deliberation that your position is incorrect, you'd change your mind.

If, on the other hand the others are unable to convince you your position was incorrect, you would remain with your position. Do you understand that?

PROSPECTIVE JUROR HARTNETT: Yes.

MR. MILTON: Miss Hartnett, if you are selected to hear this case, would you give this case your full [2210] attention and watch each witness that takes the stand and listen very carefully to what he or she has to say? And at the conclusion of this case, would you carefully analyze the facts of this case, you being the exclusive judges of the facts and apply the law that his honor gives you to those facts?

PROSPECTIVE JUROR HARTNETT: Yes, I would.

MR. MILTON: Miss Heintz, is there anything that you would like to discuss that we've discussed so far?

PROSPECTIVE JUROR HEINTZ: No.

MR. MILTON: The standard of proof, proof beyond a reasonable doubt, are you willing to apply that standard in this case?

PROSPECTIVE JUROR HEINTZ: Yes.

MR. MILTON: If, at the conclusion of this case you are persuaded beyond a reasonable doubt that the defendant committed these offenses, would you find him guilty?

PROSPECTIVE JUROR HEINTZ: Yes.

MR. MILTON: And that's whether the defense puts on a case or doesn't put on a case, whether the defendant testifies or doesn't testify. Your concern is whether or not the people have proven it beyond a reasonable doubt. Won't you agree?

PROSPECTIVE JUROR HEINTZ: Yes.

MR. MILTON: And if we do, you will find him guilty?

PROSPECTIVE JUROR HEINTZ: Yes.

* * * *

(CONFERENCE REGARDING INSTRUCTIONS)

* * * *

[5120] THE COURT: This is a discussion of the instructions. The record will reflect I have previously given counsel a list of the instructions that have been prepared by both sides. Some have been selected by me and some have been selected by counsel. I have given counsel a list and the order in which it looks like we should discuss the instructions.

MR. MILTON: I don't have the list.

MR. APPLEBAUM: I gave the Court the list back.

Your Honor, can I suggest this? We checked off the ones that there is no problem with both sides agreeing on. And perhaps the Court can just tell us, and also I wrote objections and who made the objection on the Court's list. So maybe the Court can just tell us because we don't have two lists. Mr. Milton didn't make a separate list.

THE COURT: I will, yes. Sort of generally conducting instructions and general statements of the law according to my list, counsel have agreed on 1.00, 1.01, 2.02, 1.10, 2.00.

We will discuss 2.01. Counsel have agreed on 2.02. Defendant objects to 2.05. You have agreed on 2.09. We will discuss 2.50.

You have agreed on the following: 2.11, 2.20, 2.13, 2.21, 2.23, 2.12, 2.22, 2.27, 2.25, 2.51, [5121] 2.52, 2.60, 2.61, 2.70.

Defendant has requested in addition to 2.70, 2.71 and we wiil discuss that.

You have both agreed on 2.72, 2.80, 2.81, 2.82, 2.90, 2.91, 4.50. There is a defendant's special instruction regarding, I believe it's alibi and burden of proof. We will discuss that.

All right. In the area of definitions of a crime, intents in that area, you have agreed on 8.00, 8.10, 8.11, 8.20, 8.30.

8.31 was one not requested by either side, but I included it in for discussion purposes and we will discuss that.

The people have objected to 8.37, 8.40, 8.42, 8.44, and 8.50. We will discuss those.

In addition, I have 8.52 and I have no check mark or indication about it, so I think we will discuss that. The same with 8.51. There is no noted objection on the paper. And—

MR. MILTON: It was withdrawn by the defense, I think.

THE COURT: Instruction was withdrawn?

MR. APPLEBAUM: Yes.

THE COURT: Okay. Let's mention that at the appropriate time.

There is agreement on 8.70 and 8.71. The people objected to 8.72. There is agreement on 8.73 and the people objected to 8.74. We will discuss 8.72 and

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(JURY INSTRUCTIONS GIVEN AT GUILT PHASE)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

Dept. No. 116

No. A760386
RICHARD KALUSTIAN, Judge Presiding

PEOPLE OF THE STATE OF CALIFORNIA

vs.

SANDOVAL, ALFRED

Defendant

[Filed Feb. 23, 1987]

RESPECTIVE DUTIES OF JUDGE AND JURY

Ladies and Gentlemen of the Jury:

Now that you have heard the evidence we come to that part of the trial where you are instructed on the applicable law.

You will have these instructions in their written form in the jury room for use during your deliverations.

Whether a defendant is to be found guilty or not guilty depends upon both the facts and the law.

As jurors you have two duties to perform. One duty is to determine the facts of the case from the evidence received in the trial and not from any other source. The

word "fact" means something that is proved directly or circumstantially by the evidence [or by agreement of counsel]. Your other duty is to apply the rules of law that I state to you to the facts as you determine them and in this way to arrive at your verdict.

It is my duty in these instructions to explain to you the rules of law that apply to this case. You must accept and follow the rules of law as I state them to you.

As jurors you must not be influenced by pity for a defendant or by prejudice against him. You must not be biased against the defendant because he has been arrested for this offense, or because he has been charged with a crime, or because he has been brought to trial. None of these circumstances is evidence of his guilt and you must not infer or assume from any or all of them that he is more likely to be guilty than innocent.

* * * *

You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be.

INSTRUCTIONS TO BE CONSIDERED AS A WHOLE

If any rule, direction or idea in these instructions [is] repeated or stated in varying ways, no emphasis [is] intended and you must not draw any inference because of its repetition. You are not to single out any certain sentence or any individual point or instruction and ignore the others. You are to consider all the instructions as a whole and are to regard each in the light of all the others.

The order in which the instructions [are] given has no significance as to their relative importance.

STATEMENTS OF COUNSEL—EVIDENCE STRICKEN OUT—INSINUATIONS OF QUESTIONS—STIPULATED FACTS

Statements made by the attorneys during the trial are not evidence; [however, if counsel for the parties have stipulated to any fact, you will regard that fact as being conclusively proved as to the party or parties making the stipulation].

A "stipulation" is an agreement between attorneys as to matters relating to the trial.

As to any question to which an objection was sustained, you must not guess what the answer might have been or as to the reason for the objection.

You must never assume to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you had never heard of it.

MASCULINE FORM OF PRONOUN INCLUDES ALL PERSONS

For sake of convenience, the masculine pronoun is used in these instructions and applies equally to all persons.

DIRECT AND CIRCUMSTANTIAL EVIDENCE—INFERENCES

Evidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or non-existence of a fact.

Evidence is either direct or circumstantial.

Direct evidence is evidence that directly proves a fact, without the necessity of an inference, and which by itself, if found to be true, establishes that fact.

Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct evidence and circumstantial evidence. Both direct evidence and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE TO PROVE SPECIFIC INTENT

The [specific intent] [or] [mental state] with which an act is done may be shown by the circumstances surrounding the commission of the act. But you may not find the defendant guilty of any of the offenses charged unless the proved circumstances not only are consistent with the theory that he had the required [specific intent] [or] [mental state] but cannot be reconciled with any other rational conclusion.

Also, if the evidence as to [any] such [specific intent] [or] [mental state] is susceptible of two reasonable interpretations, one of which points to the existence of the [specific intent] [or] [mental state] and the other to the absence of the [specific intent] [or] [mental state], it is your duty to adopt that interpertation which points to the absence of the [specific intent] [or] [mental state]. If, on the other hand, one interpretation of the evidence as to such [specific intent] [or] [mental state] appears to you to be reasonable and the other interpretation to be un-

reasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable.

EVIDENCE LIMITED AS TO PURPOSE

Certain evidence was admitted for a limited purpose.

At the time this evidence was admitted you were admonished that it could not be considered by you for any purpose other than the limited purpose for which it was admitted.

You are again instructed that you must not consider such evidence for any purpose except the limited purpose for which it was admitted.

PRODUCTION OF ALL AVAILABLE EVIDENCE NOT REQUIRED

Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence.

CREDIBILITY OF WITNESS

Every person who testifies under oath [or affirmation] is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.

In determining the believability of a witness you may consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following:

The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness has testified;

The ability of the witness to remember or to communicate any matter about which the witness has testified;

The character and quality of that testimony;

The demeanor and manner of the witness while testifying;

The existence or nonexistence of a bias, interest, or other motive;

Evidence of the existence or nonexistence of any fact testified to by the witness;

The attitude of the witness toward the action in which testimony has been given by the witness or toward the giving of testimony;

[A statement previously made by the witness that is [consistent] [or] [inconsistent] with the testimony of the witness;]

[An admission by the witness of untruthfulness;]

[The witness' prior conviction of a felony.]

PRIOR CONSISTENT OR INCONSISTENT STATEMENTS AS EVIDENCE

Evidence that on some former occasion, a witness made a statement or statements that were inconsistent [or consistent] with his testimony in this trial, may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on such former occasion.

[If you disbelieve a witness' testimony that he no longer remembers a certain event, such testimony is inconsistent with a prior statement or statements by him describing that event.]

WITNESS WILLFULLY FALSE— DISCREPANCIES IN TESTIMONY

A witness willfully false in one material part of his testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testi-

fied falsely as to a material point, unless, from all the evidence, you shall believe the probability of truth favors his testimony in other particulars.

However, discrepancies in a witness' testimony or between his testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience; and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

CREDIBILITY OF WITNESS—CONVICTION OF A FELONY

The fact that a witness had been convicted of a felony, if such be a fact, may be considered by you only for the purpose of determining the credibility of that witness. The fact of such a conviction does not necessarily destroy or impair the witness' credibility. It is one of the circumstances that you may take into consideration in weighing the testimony of such a witness.

WEIGHING TRANSCRIPT TESTIMONY OF UNAVAILABLE WITNESS

In this case testimony given by a witness at a prior proceeding who was unavailable at this trial has been read to you from the reporter's transcript of that proceeding. You are to consider such testimony in the same light and in accordance with the same rules which you have been given as to testimony of witnesses who have testified here in court.

WEIGHING CONFLICTING TESTIMONY

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not pro-

duce conviction in your mind, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. This does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

SUFFICIENCY OF TESTIMONY OF ONE WITNESS

Testimony which you believe given by one witness is sufficient for the proof of any fact. However, before finding any fact [required to be estabilshed by the prosecution] to be proved solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends.

REFUSAL OF WITNESS TO TESTIFY—EXERCISE OF PRIVILEGE AGAINST SELF-INCRIMINATION

When a witness refuses to testify as to any matter, basing his refusal on the constitutional privilege against self-incrimination, you are not to draw from that fact any inference as to the credibility of the witness or as to the guilt or innocence of the defendant.

MOTIVE

Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

FLIGHT AFTER CRIME

The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

DEFENDANT NOT TESTIFYING—NO INFERENCE OF GUILT MAY BE DRAWN

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. You must not draw any inference from the fact that he does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way.

DEFENDANT MAY RELY ON STATE OF EVIDENCE

In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him, and no lack of testimony on defendant's part will supply a failure of proof by the People so as to support a finding against him on any such essential element.

CONFESSION AND ADMISSION—DEFINED

A confession is a statement made by a defendant other than at his trial in which he has acknowledged his guilt of one or more of the crime(s) for which he is on trial. In order to constitute a confession, such a statement must acknowledge participation in the crime(s) as well as the required [criminal intent].

[A statement made by a defendant other than at his trial is not a confession but an admission whenever the

statement does not by itself acknowledge his guilt of one or more of the crime(s) for which he is on trial, but which tends to prove his guilt when considered with the rest of the evidence.]

You are the exclusive judges as to whether the defendant made a confession [or an admission], and if so, whether such statement is true in whole or in part. If you should find that the defendant did not make the statement, you must reject it. If you find that it is true in whole or in part, you may consider that part which you find to be true.

Evidence of an oral confession [or oral admission] of the defendant shou'd be viewed with caution.

CORPUS DELICTI MUST BE PROVED INDEPENDENT OF ADMISSION OR CONFESSION

No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any [confession or] admission made by him outside of this trial.

The identity of the person who is alleged to have committed a crime is not an element of the crime [nor is the degree of the crime]. Such identity [or degree of the crime] may be established by an admission [or confession].

EXPERT TESTIMONY

A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.

Duly qualified experts may give their opinions on questions in controversy at a trial. To assist you in deciding such questions, you may consider the opinion with the reasons given for it, if any, by the expert who gives the

opinion. You may also consider the qualifications and credibility of the expert.

[In resolving any conflict that may exist in the testimony of expert witnesses, you should weigh the opinion of one expert against that of another. In doing this, you should consider the relative qualifications and credibility of the expert witnesses, as well as the reasons for each opinion and the facts and other matters upon which it was based.]

You are not bound to accept an expert opinion as conconclusive, but should give to it the weight to which you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable.

OPINION TESTIMONY OF LAY WITNESS

In determining the weight to be given to an opinion expressed by any witness [who did not testify as an expert witness], you should consider his credibility, the extent of his opportunity to perceive the matters upon which his opinion is based and the reasons, if any, given for it. You are not required to accept such an opinion but should give it the weight, if any, to which you find it entitled.

CONCERNING HYPOTHETICAL QUESTIONS

In examining an expert witness, counsel may ask him a type of question known in the law as a hypothetical question. By such a question the witness is asked to assume to be true a hypothetical state of facts, and to give an opinion based on that assumption.

In permitting such a question, the court does not rule, and does not necessarily find that all the assumed facts have been proved. It only determines that those assumed facts are within the probable or possible range of the evidence. It is for you, the jury, to find from all the evidence whether or not the facts assumed in a hypothetical

question have been proved, and if you should find that any assumption in such a question has not been proved, you are to determine the effect of that failure of proof on the value and weight of the expert opinion based on the assumption.

PRESUMPTION OF INNOCENCE—REASONABLE DOUBT—BURDEN OF PROOF

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

BURDEN OF PROVING IDENTITY BASED SOLELY ON EYE WITNESSES

The burden is on the State to prove beyond a reasonable doubt that the defendant is the person who committed the offense with which he is charged.

If after considering the circumstances of the identification [and any other evidence in this case], you have a reasonable doubt whether defendant was the person who committed the offense, you must give the defendant the benefit of that doubt and find him not guilty.

ALIBI

The defendant in this case has introduced evidence for the purpose of showing that he was not present at the time and place of the commission of the alleged offense for which he is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time the crime was committed, he is entitled to an acquittal.

HOMICIDE—DEFINED

The word homicide means the killing of one human being by another, either lawfully or unlawfully. As used in these instructions, the word homicide includes murder and manslaughter, which are unlawful, and the acts of excusable and justifiable homicides, which are lawful.

MURDER—DEFINED

[Defendant is charged in [Counts 1-4 of] the information with the commission of the crime of murder, a violation of Section 187 of the Penal Code.]

The crime of murder is the unlawful killing of a human being with malice aforethought.

In order to prove the commission of the crime of murder, each of the following elements must be proved:

1. That a human being was killed,

2. That the killing was unlawful, and

3. That the killing [was done with malice aforethought].

"MALICE AFORETHOUGHT"—DEFINED

"Malice" may be either express or implied.

[Malice is express when there is manifested an intention unlawfully to kill a human being.]

[Malice is implied (1) [when the killing results from an intentional act involving a high degree of probability that it will result in death, which act is done for a base, antisocial purpose and with a wanton disregard for human life] [or] (2) [when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life].]

[When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought.]

The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

"Aforethought" does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act.

DELIBERATE AND PREMEDITATED MURDER

All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethough is murder of the first degree.

The word "willful," as used in this instruction, means intentional.

The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word "premeditated" means considered beforehand.

If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon

pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it include an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder on the first degree.

To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill.

UNPREMEDITATED MURDER OF THE SECOND DEGREE

Murder of the second degree is the unlawful killing of a human being with malice aforethought when there is manifested an intention unlawfuly to kill a human being but the evidence is insufficient to establish deliberation and premeditation.

SECOND DEGREE MURDER—KILLING RESULTING FROM ACT DANGEROUS TO LIFE

Murder of the second degree is [also] the unlawful killing of a human being as the direct causal result of an intentional act, (1) [involving a high degree of probability

that it will result in death, which act is done for a base, antisocial purpose and with wanton disregard for human life.] [or] (2) [the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for human life.]

When the killing is the direct result of such an act, it is not necessary to establish that the defendant intended that his act would result in the death of a human being.

MANSLAUGHTER—DEFINED

The crime of manslaughter is the unlawful killing of a human being without malice aforethought.

VOLUNTARY MANSLAUGHTER—DEFINED

The crime of voluntary manslaughter is the unlawful killing of a human being without malice aforethought when there is an intent to kill.

There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion, [or] [in the honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury].

In order to prove the commission of the crime of voluntary manslaughter, each of the following elements must be proved:

1. That a human being was killed,
2. That the killing was unlawful, and
3. That the killing was done with the intent to kill.

SUDDEN QUARREL OR HEAT OF PASSION AND PROVOCATION EXPLAINED

To reduce an intentional felonious homicide from the offense of murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of such character and degree as naturally would excite and arouse such passion, and the assailant must act under the smart of that sudden quarrel or heat of passion.

The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up his own standard of conduct and to justify himself because his passions were aroused unless the circumstances in which he was placed and the facts that confronted him were such as also would have aroused the passion of the ordinarily reasonable man faced with the same situation. The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.

SUDDEN QUARREL OR HEAT OF PASSION AND PROVOCATION EXPLAINED

If there was provocation, but of a nature not normally sufficient to arouse passion, or if sufficient time elapsed between the provocation and the fatal blow for passion to subside and reason to return, and if an unlawful killing of a human being followed such provocation and had all the elements of murder, as I have defined it, the mere fact of slight or remote provocation will not reduce the offense to manslaughter.

MURDER OR MANSLAUGHTER—COOLING PERIOD

To reduce a killing upon a sudden quarrel or heat of passion from murder to manslaughter the killing must have occurred while the slayer was acting under the direct and immediate influence of such quarrel or heat of passion. Where the influence of the sudden quarrel or heat of passion has ceased to obscure the mind of the accused and sufficient time has elapsed for angry passion to end and for reason to control his conduct, it will no longer reduce an intentional killing to manslaughter. The question as to whether the cooling period has elapsed and reason has returned is not measured by the standard of the accused, but the duration of the cooling period is the time it would take the average or ordinarily reasonable person to have cooled his heat of passion and for his reason to have returned.

NO SPECIFIC EMOTION ALONE CONSTITUTES HEAT OF PASSION

Neither the emotion of fear, of itself, nor the emotion for revenge, of itself, nor the emotion induced by and accompanying or following an intent to commit a felony, of itself, nor any or all of these emotional states, in and of themselves, constitute the heat of passion referred to in the law of manslaughter which I have stated to you. Any or all of such specific emotions may be involved in a heat of passion that causes judgment to give way to impulse and rashness, but also any one or more of them may exist in the mind of a person who acts deliberately and from choice following his own reasoning howsoever good or bad it may be. Hence the law sets up the standard and requires the test that I previously have stated to you for determining whether or not the defendant acted under heat of passion.

MURDER AND MANSLAUGHTER DISTINGUISHED

The distinction between murder and manslaughter is that murder requires malice while manslaughter does not.

When the act causing the death, though unlawful, is done [in the heat of passion or is excited by a sudden quarrel such as amounts to adequate provocation] [in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury] the offense is manslaughter. In such a case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent.

To establish that a killing is murder and not manslaughter, the burden is on the state to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the [heat of passion or upon a sudden quarrel] [in the honest, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury].

DUTY OF JURY AS TO DEGREE OF MURDER

Murder is classified into two degrees, and if you should find the defendant guilty of murder, it will be your duty to determine and state in your verdict whether you find the murder to be of the first or second degree.

DOUBT WHETHER FIRST OR SECOND DEGREE MURDER

If you are convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but you have a reasonable doubt whether such murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.

DOUBT WHETHER MURDER OR MANSLAUGHTER

If you are satisfied beyond a reasonable doubt that the killing was unlawful, but you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of such doubt and find it to be manslaughter rather than murder.

UNANIMOUS AGREEMENT AS TO OFFENSE—FIRST OR SECOND DEGREE MURDER OR MANSLAUGHTER

Before you may return a verdict in this case, you must agree unanimously not only as to whether the defendant is guilty or not guilty, but also, if you should find him guilty of an unlawful killing, you must agree unanimously as to whether he is guilty of [murder of the first degree,] [or] [murder of the second degree,] [or] [voluntary] manslaughter.

EVIDENCE OF PROVOCATION MAY BE CONSIDERED IN DETERMINING DEGREE OF MURDER

When the evidence shows the existence of provocation that played a part in inducing the unlawful killing of a human being, but also shows that such provocation was not such as to reduce the homicide to manslaughter, and the jury finds that the killing was murder, they may consider the evidence of provocation for such bearing as it may have on the question whether the murder was of the first or second degree.

ATTEMPT—DEFINED

An attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.

Acts of a person who intends to commit a crime will constitute an attempt where they themselves clearly indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design, the progress of which would be completed unless interrupted by some circumstance not intended in the original design.

In the crime of attempted murder, as charged in Count 5, malice must be express, that is, there must be manifested an intent to kill.

CONCURRENCE OF ACT AND MENTAL STATE AND/OR SPECIFIC INTENT

In each of the crimes charged in the information there must exist a union or joint operation of fact or conduct and a certain mental state and/or specific intent in the mind of the perpetrator and unless such mental state and/or specific intent exists, the crime to which it relates is not committed.

The mental state and/or specific intent for each crime is included in the instructions defining that crime.

RESISTING ATTEMPT TO COMMIT FELONY

Homicide is justifiable and not unlawful when committed by any person when resisting an attempt to commit a forcible and atrocious crime.

JUSTIFIABLE HOMICIDE IN SELF-DEFENSE

The killing of another person in self-defense is justifiable and not unlawful:

1. When the person who does the killing has reasonable ground to believe and does believe that there is imminent danger that the other person will kill him or cause him great bodily injury, and

2. A reasonable person under the same circumstances would believe that it was necessary to kill the other person to prevent death or great bodily injury to himself.

In order to justify killing another person in self-defense, actual danger or great bodily injury is not necessary. On the other hand, a bare fear of death or great bodily harm is not sufficient.

In order to justify a killing it must be established:

1. The circumstances must be sufficient to excite the fears of a reasonable person that there was imminent danger of death or great bodily injury, and

2. The party killing must have acted under the influence of such fears alone and under the belief that such killing was necessary to save himself from death or great bodily injury.

JUSTIFIABLE HOMICIDE—LAWFUL DEFENSE OF SELF OR ANOTHER

Homicide is justifiable and not unlawful when committed by any person in the defense of another if a reasonable man in a like situation would believe that the person killed intended to commit a forcible and atrocious crime and that there was imminent danger of such crime being accomplished. A person may act upon appearances whether such danger is real or merely apparent.

USE OF FORCE IN DEFENSE OF ANOTHER

It is lawful for a person who, as a reasonable person, has grounds for believing and does believe that bodily injury is about to be inflicted upon another person to protect him from attack.

In doing so he may use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent.

SELF-DEFENSE AGAINST ASSAULT

It is lawful for a person who is being assaulted to defend himself from attack if, as a reasonable person, he has grounds for believing and does believe that bodily injury is about to be inflicted upon him. In doing so he may use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent.

SELF-DEFENSE—ASSAILED PERSON NEED NOT RETREAT

A person who is threatened with an attack that justifies the exercise of the right of self-defense, need not retreat. In the exercise of his right of self-defense he may stand his ground and defend himself by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation and with similar knowledge; and he may pursue his assailant until he has secured himself from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene.

SELF-DEFENSE—ACTUAL DANGER NOT NECESSARY

Actual danger is not necessary to justify self-defense. If one is confronted by the appearance of danger which arouses in his mind, as a reasonable person, an honest conviction and fear that he is about to suffer bodily injury, and if a reasonable man in a like situation, seeing and knowing the same facts, would be justified in believing himself in like danger, and if the person so confronted acts in self-defense upon such appearances and from such fear and honest convictions, his right of self-defense is the same whether such danger is real or merely apparent.

HONEST BUT UNREASONABLE BELIEF IN NECESSITY TO DEFEND—MANSLAUGHTER

A person who kills another person in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury kills unlawfully, but does not harbor malice aforethought and cannot be found guilty of murder. This would be so even though a reasonable man in the same situation seeing and knowing the same facts would not have had the same belief. Such an honest but unreasonable belief is not a defense to the crime of manslaughter.

SELF-DEFENSE—WHEN DANGER CEASES

The right of self-defense exists only as long as the real or apparent threatened danger continues to exist. When such danger ceases to appear to exist, the right to use force in self-defense ends.

SELF-DEFENSE NOT AN EXCUSE AFTER ADVERSARY DISABLED

The right of self-defense ceases to exist when there is no longer any apparent danger of further violence on the part of an assailant. Thus where a person is attacked under circumstances which justify his exercise of the right of self-defense, and thereafter he uses such force upon his attacker as to render the attacker [apparently] incapable of inflicting further injuries, the law of self-defense then ceases to work in favor of the person attacked.

SELF-DEFENSE BY AN AGGRESSOR

The right of self-defense is not immediately available to a person who was originally an assailant, but such person must really and in good faith endeavor to decline further combat and fairly and clearly inform his adversary of his desire for peace and that he has abandoned the contest. After such steps have been taken, if his opponent continues the fight, the rights of the person who was the

original assailant, with respect to self-defense, are then the same as the rights of any person assailed by another.

PLEA OF SELF-DEFENSE MAY NOT BE CONTRIVED

The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense.

FINDING IF DEFENDANT PERSONALLY USED A FIREARM IN COMMISSION OF A FELONY

It is alleged [in all Count[s] that the defendant personally used a firearm during the commission of the crime[s] charged.

The word "firearm" includes [a gun.]

The term "used a firearm," as used in this instruction, means to display a firearm in a menacing manner, intentionally to fire it, or intentionally to strike or hit a human being with it.

If you find the defendant guilty of [one or more] of the crime[s] charged [or an attempt to commit the crime[s] charged] [or a lesser and included felony offense], it then will be your duty to find whether the defendant personally used a firearm in the commission of such felony.

FINDING IF DEFENDANT PERSONALLY USED A FIREARM IN COMMISSION OF A FELONY

The defendant may be found to have personally used a firearm during the commission of such felony, only if the proof shows beyond a reasonable doubt that such defendant personally used a firearm at such time.

You will include a finding on that question in your verdict, using a form that will be supplied for that purpose.

FINDING IF DEFENDANT INTENTIONALLY INFLICTED GREAT BODILY INJURY

It is charged [in Count 5] that in the [attempted] commission of the crime therein described the defendant, with the specific intent to inflict such injury, personally inflicted great bodily injury on [Manuel Torres].

If you find the defendant guilty of Count 5 it then will be your duty to determine whether or not the defendant, with the specific intent to inflict such injury, did personally inflict great bodily injury, as herein defined, on [Manuel Torres] in the commission of attempted murder or attempted manslaughter. The burden is on the People to prove this beyond a reasonable doubt.

The term "great bodily injury" as used in this instruction means a significant or substantial physical injury. Minor or moderate injuries of a temporary nature do not constitute great bodily injury within the meaning of this instruction.

You will include a finding on that question in your verdict, using a form that will be supplied for that purpose.

CALJIC 8.80 and 8.81.3 (Modified)

If you find the defendant in this case guilty of any count of first degree murder, you must then determine if the special circumstance charging him with multiple murder is true.

To find this special circumstance to be true you must find that, in addition to the first degree murder just referred to, the defendant was convicted in this trial of another murder. That other, or second, murder may be of the first or second degree.

A special circumstance must be proved beyond a reasonable doubt.

If you have a reasonable doubt as to whether a special circumstance is true, it is your duty to find that it is not true.

In order to find the special cricumstance charged in this case to be true or untrue, you must agree unanimously.

You will include in your verdict on a form that will be supplied your finding as to whether the special circumstance is or is not true.

SPECIAL CIRCUMSTANCES—JURY MUST NOT CONSIDER PENALTY

In your deliberations the subject of penalty or punishment is not to be discussed or considered by you. That is a matter which must not in any way affect your verdict or affect your finding as to the special circumstance charged in this case.

ALL INSTRUCTIONS NOT NECESSARILY APPLICABLE

You have been instructed as to all the rules of law that may be necessary for you to reach a verdict. Whether some of the instructions will apply will depend upon your determination of the facts. You will disregard any instruction which applies to a state of facts which you determine does not exist. You must not conclude from the fact that an instruction has been given that the court is expressing any opinion as to the facts.

SEVERAL COUNTS—DIFFERENT OCCURRENCES —JURY MUST FIND ON EACH

Each count charges a distinct offense. You must decide each count separately. The defendant may be found guilty or not guilty of [any or all] of the offenses charged. Your finding as to each count must be stated in a separate verdict.

JURY NOT TO TAKE CUE FROM THE JUDGE

I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts on any questions submitted to you, or that I believe or disbelieve any witness.

If anything I have done or said has seemed to so indicate, you will disregard it and form your own opinion.

INDIVIDUAL OPINION REQUIRED—DUTY TO DELIBERATE

Both the People and the defendant are entitled to the individual opinion of each juror.

It is the duty of each of you to consider the evidence for the purpose of arriving at a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after a discussion of the evidence and instructions with the other jurors.

You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.

HOW JURORS SHOULD APPROACH THEIR TASK

The attitude and conduct of jurors at the beginning of their deliberations are matters of considerable importance. It is rarely productive of good for a juror at the outset to make an emphatic expression of his opinion on the case or to state how he intends to vote. When one does that at the beginning, his sense of pride may be aroused, and he may hesitate to change his position even if shown that it is wrong. Remember that you are not partisans or advocates in this matter, but are judges.

MANNER OF RECORDING INSTRUCTIONS OF NO SIGNIFICANCE-CONTENT ONLY GOVERNS

The written instructions now being given will be made available in the jury room during your deliberations. They must not be defaced in any way.

You will find that the instructions may be either printed, typewritten or handwritten. Some of the printed or typewritten instructions may be modified by typing or handwriting. Blanks in the printed instructions may be filled in by typing or handwriting. Also, portions of printed or typewritten instructions may have been deleted by lining out.

You are not to be concerned with the reasons for any modifications that have been made. Also, you must disregard any deleted part of an instruction and not speculate either what it was or what is the reason for its deletion.

Every part of an instruction whether it is printed, typed or handwritten is of equal importance. You are to be governed only by the instruction in its final wording whether printed, typed or handwritten.

ADMONITION AGAINST DISCLOSURE OF JURY BALLOTING

You shall not disclose to anyone outside the jury, not even to the court or any member of its staff, either verbally or in writing, how you are divided numerically in your balloting as to the guilt or innocence of [the] defendant or as to [any] offense charged, until specifically directed so to do by the court.

USE OF MULTIPLE VERDICT FORMS

There are 4 possible verdicts as to count(s) 1 and 2.

There are 3 possible verdicts as to count(s) 3 and 4.

There are 3 possible verdicts as to count 5.

These various possible verdicts are set forth in the forms of verdict which you will receive. Only one of the possible verdicts may be returned by you [as to any particular count]. If you all have agreed upon one verdict [as to a particular count], the corresponding form is the only verdict form to be signed [as to that count]. The other forms are to be left unsigned.

CONCLUDING INSTRUCTION

You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to reach a verdict, all twelve jurors must agree to the decision [and to any finding you have been instructed to include in your verdict]. As soon as all of you have agreed upon a verdict, you shall have it dated and signed by your foreman and then shall return with it to this courtroom.

* * * *

(EXCERPTS FROM COUNSELS' ARGUMENTS TO THE JURY)

DEFENSE COUNSEL ARGUMENT

Then we get into some legal concepts. We talked about during voir dire at the very beginning this whole concept of guilty, not guilty and not proven. Remember we talked about the Scottish system way back when, and how that applies in this case?

There is really just one question you have to ask yourself with regards to each and every charge in this case and each and every component part or element. And the question is do I have a doubt and is my doubt reasonable. And if the answer to both those questions is yes, then it's either not proven or not guilty. It doesn't matter. Not proven or not guilty are one in the same in our system and you have to treat it that way.

If you answer one of those questions no, then that means there is perhaps a conviction as to that count or something less in that count.

If it's a murder, for example, maybe a second degree murder as opposed to a first degree murder or manslaughter as opposed to a first or second degree if you do not have a doubt.

And if you do have a doubt, then you ask yourself is that doubt really reasonable. And if you say no, then that means there is a conviction. But that's the only real question you have ot ask yourself once you determine what the facts are.

In terms of the law, we have a homicide here in Belvedere Park. No if's, and's or but's about it, there is a homicide. There is a killing of two people. Question remains whether it's lawful or unlawful to find out what that homicide is. Is it murder in the first or second degree? Is it manslaughter or is it justifiable homicide? But there is no question there is a homicide.

There is also no question that Freddie did it. He shot these two kids. I call them kids because they are 18, 19 year old. There is no question that Fred shot them. It's a question of what the circumstances were surrounding the shooting. That's important.

And what you as reasonable people would consider, what is this homicide? Is it murder? If it is, what degree of murder is it? Is it a manslaughter or is it justifiable?

We know that murder, that a human being was killed, that the killing is unlawful as opposed to justified and it was done with malice aforethought.

Malice aforethought sounds like a foreboding term, but it's really not. It's just is there an intention manifest to kill. In other words, if a person intended in a cold, rational manner, let's say reloading the gun after shooting, there is no question in a situation like that you just shoot somebody reacting to a situation reload the gun and then start shooting again, you intend to kill them. That's malice. I mean, it's the obvious. Like being the herald of the obvious in that sense, but that's what malice is.

In order to have any type of murder, you have to have malice. The absence of malice, even though you may have a killing, would be manslaughter. Or if it's justifiable homicide, acting under self-defense or defense of others.

There is also the absence of malice. There is no murder in terms of the law. There is two separate ways to deal with the absence of malice. In fact, I think they wrote a book once or a movie, the absence of malice, and that's what it means. The important part of what is murder. Murder in the first and second degree both require malice. Malice aforethought.

In order to to have a first degree murder, requires premeditation and deliberation. And the judge read you an instruction with regards to premeditation and deliberation, and what does it mean?

Deliberation, deliberate means the result of careful thought, weighing the considerations both for and against doing the killing.

Now you have to put yourself in the shoes of Freddie Sandoval in that park at that night under those conditions with those same people. Was there time to weigh and consider for and against doing the murder? Did he have a chance to really deliberate? I mean, what does that tell us? Was it formed upon a pre-existing reflection as opposed to the sudden heat of passion or a condition precluding the idea of deliberation.

So this concept of heat of passion or sudden quarrel comes into play when you are analyzing when there was deliberation. So did he have a chance to weigh, to balance what he is doing or did things just happen? Was he the focus of this vortex of people? In a short time? Whether or not it was a cold calculated judgment.

Again, this whole concept of thinking through what you are going to do as opposed to just reacting to a situation. That's what sets aside first degree murder from second degree murder and manslaughter, this concept of premeditation and deliberation, a cold calculated judgment and decision. It can be arrived at in a short period of time, sure it can. But a mere unconsidered and rash impulse, even though there is an intent to kill is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

So it's more than just a yes or no kind of switch. Shoot, not shoot. Limbic lobe. Run, fight. You have to really weigh and consider and balance and go through that kind of thought. You have to balance the reasons for and against the choice of doing what you are doing, and having in mind the consequences of killing or not killing. That's what the law talks about.

And this isn't just made up, you know, last week. I mean, this is the distillation of certainly 800 years of Anglo American law from the time of Runnymead. And we know historically, it goes back way farther into Roman

times and even beyond into biblical times as to weighing and consideration.

So you have to ask yourself these questions. Has the prosecution shown you beyond a reasonable doubt that there was premeditation and deliberation with regards to these shootings in the park? And I think based on this evidence, the answer is no. There was no premeditation and deliberation. There was no careful reflection on the act. There was no time to balance and consider and weigh the consequences of the act.

Take the people's best case, forget the defense case for a second. Take the people's best case and drive to the park. There is a fight, a separate fight. Wolfie and Martinez and Aceves. What stopped them from getting into the car? Nothing. Why did they end up over here where the defendant was? Where Freddie Sandoval and Pelon were? It all happened very quickly. There was no time to premeditate and deliberate even in the people's best case.

Even if saying that Carlos Tostado was right in saying that the grabbing of them and shooting of them. Quick, sudden, rash, impulsive act even in that case.

And I am not suggesting for a second that that's actually what happened. It was much more involved than that. But even the people's best case, I am suggesting to you that the evidence shows no first degree murder with regards to what happened in Belvedere Park.

You have to then look at do I have a doubt and is my doubt reasonable with regards to premeditation and deliberation? If the answer is yes, okay. Then go down and see about second degree murder. And I am suggesting the answer is yes.

Murder of the second degree also is the killing with malice aforethought with the intent to kill. But the evidence is insufficient to establish deliberation and premeditation. Second degree, people's best case? Maybe, possibly. Possibly. Even the people's best case.

But you have to also look at the whole concept of one, heat of passion, sudden quarrel, to create the absence of malice or in a totally separate concept, legal concept from heat of passion and sudden quarrel where things come at you quickly and suddenly where you don't have time to think. You just react, defending yourself, defending another person from attack. You have an absolute right to do that. Totally separate concept, two different ways to create the absence of malice.

So you again ask yourself those questions. Do I have a doubt and is that doubt reasonable with regards to second degree murder? Which then would bring us to voluntary manslaughter, where there is an unlawful killing without malice.

Now you have to look at the without malice. The killing occurred upon a sudden quarrel or heat of passion or in the honest but unreasonable belief in the necessity to defend oneself or the another person. You have to think about that, defending yourself or another person. The absence of malice. And again, the sudden quarrel or your own fear, whether reasonable or unreasonable, as long as you have an honest belief that you are in fear in danger for your safety.

And we know the kind of cut that appeared here. Here is defense B. You didn't get this climbing over a wall or a fence. Described as a half inch deep cut. Put yourself in the shoes of Freddie Sandoval and Eugene Valenzuela in that situation. You think there was a fear? You think it was unreasonable maybe to shoot a person? Maybe. That's for you to decide.

But if it was an honest belief about the necessity to defend yourself then, even there it would be a manslaughter. If it was an honest and reasonable belief, then we're talking about justifiable homicide. These are the questions you must ask yourself.

So what do we mean by a sudden quarrel or heat of passion? Again, these rules that come down, the state of the law that you promised that you would consider and apply if you believe it applied to a set of facts.

This doesn't come overnight. These are still from centuries and centuries of thought, trial and error, and study of human beings and the way people live, the way people do things.

To reduce an intentional felonious homicide from murder to manslaughter upon the grounds of sudden quarrel or heat of passion, the provocation, the provocation must be of such character and degree as that naturally would excite and arouse such passion, and the assailant must act under the smart of that sudden quarrel or heat of passion.

Again, you don't have time to think. Things are just happening. This heat of passion to reduce a homicide to manslaughter, but it must be such a passion that would be naturally aroused in the minds of ordinary reasonable persons in the same situation or circumstances. That's you. That's why you are here. You are the ordinary reasonable people. The jury of peers. Members of our community.

What would you do in that situation? Under those circumstances? Under those conditions? So if that heat of passion who would arouse that feeling in you, it certainly would arouse it in Freddie Sandoval.

The question to be answered is whether or not at the time of the killing the reason of the accused was obscured or disturbed by the passion to such an extent that would cause again the ordinary reasonable person of average disposition to act rashly without deliberation and reflection and from such passion rather than from judgment.

So I think now we are starting to understand what we're really talking about. It's this concept of judgment, calculation and thought weighing back and forth. Would you have time, you as reasonable people, to go through that balancing process under these conditions? And then of course, the provocation has to be of such a nature to really arouse a passion. It can't be that. It's not that clearly. But it is this. You have reasonable doubts with regards to the degree of murder. If you just can't decide, you must give the benefit to Fred. That's the law. And

it's right. It's right. It's the individual against the entire power of the might and majesty of the State of California.

And the same is true with regards to if you have some doubts between murder and manslaughter, you must give the benefit of the doubt to the individual.

So how do we deal with this concept of malice aforethought? I mean, this is the mind set, the specific intent of the person there in the park. How do we determine what was going on in the mind?

And there is a rule of law that deals with it and it's circumstantial evidence. Remember I talked about this concept of tunnel vision? Tunnel vision cannot accept more than one interpretation of evidence.

Prosecutor has presented you with a picture that doesn't allow for any other rational conclusion. And what I am saying to you and what I think the evidence will suggest to you, in fact, even more than suggest to you, just flat out tell you is that there are several possibilities that are reasonable with regards to what the evidence is. Yeah.

Could have been intentional that he shot them in cold blood. That's one possibility based on the prosecution's best case without considering the defense, and the other is he was reacting to a situation. Those are both very reasonable interpretations.

So let's look at what the circumstantial evidence rule of law is and how you deal with it. You have to look at the totality of the circumstances, this whole concept of composites. The malice aforethought which is the specific intent that we're dealing with may be shown by the circumstances surrounding the commission of the act. The act is the shooting, the focus of the people coming in the park.

Now here is how it goes. Unless the proved circumstances not only are consistent with the theory that Freddie had the required malice aforethought or specific intent, but it cannot be reconciled with any other rational conclusion.

So look at all of the facts about what happened. Are there more than one rational conclusion that you can draw from these facts? If the evidence of this malice aforethought is susceptible of two reasonable interpretations, one of which points to the existence of malice aforethought and the other points to the absence of malice aforethought, it's your duty, your duty to adopt the one that points to the absence of malice. That's your oath. That's the law.

So you have to look at it. If there is an absence of malice, it's either manslaughter or justifiable homicide. Look at the total circumstances surrounding the act to make that determination. Don't wear blinders. Don't have tunnel vision. Weigh and consider. You will come up with clear light based on the photon packets that have been provided. Trust your instincts. Trust your common sense. Trust your intelligence. That's why you are here. So how do we decide really what these circumstances are? What do we have to look for?

Well, we have to look at what the witnesses tell us, and then we look at what the physical evidence is, and you have to decide. So in terms of dealing with witnesses, what do you look at? How do you decide if witnesses are telling you the truth either in whole or in part? And you can do that. You can assign anywhere from zero or up to a hundred percent for the credibility of any witness, any witness. How do you do that? Give you some guidelines. These are not frozen in stone, but these are kind of guidelines that the court read to you.

You can consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witnesses, including but not limited to—that's why I am saying it's not frozen in stone—the extent of the opportunity or ability of the witness to see or hear what they told you about.

Example. We talked about these pyramids up here, and the block wall dividers. You can't see through block wall dividers. You are only going to see glimpses in

certain perspectives. So witnesses have blinders, too, sometimes physical blinders where they can only see certain things and can't see something over here. Now if they mover over, they can see it. But that's something that you have to consider for each witness, the ability to perceive.

The ability for them to remember and communicate the matter that they are talking about. Some people are not very articulate; some people are. Some people are trained to testify; some people are not.

The character and quality of the testimony. I mean, you have to measure that. Their body language. Their demeanor, in other words.

The existence or nonexistence of a bias or motive. Well, some witnesses do have bias and motive. That has been suggested. You know, they are under the wing of the State.

Bennie Verduzco is being paid. He gets $600 bucks a month tax free, our money, till he finds a job. Sounds like to me after tax statements that he hasn't worked in a long time and probably is not going to. It's a bias. That's a motive for his act.

Tostado. He is getting protection. Somehow has planted in his mind he talked to the officers on the 16th and laid everything out, names, dates, times, how people were standing that in his mind he was now a snitch. And he was under the wing of the prosecutor, the prosecution. That's a bias. Those are things to consider.

The existence or nonexistence of any fact testified to by a witness.

The attitude of the witness towards the testimony that they are giving or the action that they are giving.

Previous statements that are consistent or inconsistent.

The admission of untruthfulness of a witness. And again, Bennie's an easy example. He flat out told you he did not take Pelon to his mother's. After his mom testifies, and I guess just no matter what you do, you are

not going to lie on your mom. I wouldn't. I can lie to you, lie to me, but he is not going to lie on his mom.

After his mother testified, he said, "Well, yeah, I did take him." An admission of untruthfulness. He told you he lied.

And then of course, the witnesses prior conviction of a felony. Why do they have a prior conviction of a felony? Because people who have felony convictions are not exactly your basic upstanding citizen of the communty. They have a history of being thieves and liars and not credible people.

So those are the things that you consider in determining the credibility of a witness. And that's your job. That's your focus.

How do you decide how much credibility to give, accepting some things, rejecting some things? Again, this composite view. You have to create clear light, or try to find clear light.

We know as part of human condition two people can see the same event and see it totally differently. That's one of the conditions of life, depending where you are standing, what you are doing at the time, your ability to see, that's a very common condition.

In the law that applies to that, failure of recollection is a common experience. People sometimes do forget some things, but that's why we ask questions to try and test that, to give you the opportunity to weigh and consider that.

Innocent misrecollection is not uncommon. People do make mistakes and misrecollect certain things. Happens all the time. In fact, two people witnessing again the same event or incident, transaction see it and here it differently, depending on perspective.

The real question is is the discrepancy with regards to something that's really important or something that's kind of trivial? And again, you have to look back at the time the observations were made to make that determination.

Now a person who is materially false, the prosecutor kept harping on that. Doctor Trockman was materially false. Look at the quality of the testimony. Think about what materially false is. A witness who is willfully false in one material part of his testimony is to be distrusted in others. You may reject the whole testimony of that person or you might believe part of it and not believe part of it.

But what do they mean by a person who is false, willfully false in a material part? What does that mean? Well, we know again Bennie lying about his mom, and then having to come back and say no, because she testified because the defense brought her in. That's false, willfully false to a material point as opposed to just accusations. I mean, that's a specific example.

We have one witness who testified who wasn't here. Manuel Torres who died in a car accident or truck accident. It's hard to get the flavor of a person who is not physically testifying in front of you. You can't see him.

We had Sergeant Travis read that testimony without seeing the individual. Now you have to still take that testimony just like you would any other testimony and weigh it and consider it and decide. But it's a little more difficult really.

I mean, in truth and in fact, it's a little more difficult because you do not see the person. You don't know how they are acting or what they are doing at the time. But that's what you have to do. So it's a little different flavor, but you really have to try to apply that.

We all agreed when he started this back way back when during voir dire, you were telling us the truth that you would decide this case based only on the evidence that was presented to you, not other evidence. And the rule of law is that defendant Freddie can choose to rely on the state of the evidence and upon the failure, if any, of the people to prove beyond a reasonable doubt every essential element of the charge against him. And no lack of testimony on his part will supply a failure of proof by

the people as to support a finding against him on any such essential element.

The burden of proving the case is on the prosecution. I don't have to prove anything. We can rely on the state of the evidence and on the failure of the prosecution to have proved these charges beyond a reasonable doubt, and you must weigh and consider based only on what you heard, and promised that you will do that. I trust that you will do that. In fact, I have seen you long enough. I know you are going to do it.

Presumption of innocence. He is sitting right here before you. He is presumed to be innocent just like I am or you would or anybody would who is charged. And it goes right into the jury room with you.

The prosecutor has the burden of proof. And again, you have to look at this burden of proof and what is reasonable doubt. It's not a mere possible doubt. Anything can be possible. The moon could be made out of blue cheese, I guess. I guess not. We have been there. It cannot be.

So another planet could be made out of blue cheese. But that's really not in the realm of what we're talking about. What we're talking about is an abiding conviction to a moral certainty of the truth of the charge. I am not sure what that means exactly. I guess that you kind of know it when you see it. Do I have a doubt? Is that doubt reasonable? That is the question you have to ask.

And based on this case and based on this evidence, I don't think it's first degree murder under any theory, under any theory. What is it? What is it? Second degree murder? Manslaughter? Justifiable homicide? You have to make that determination. Person has a right to defend themselves from attack. Person has a right to defend another person, especially one standing right next to him from attack.

How do we analyze this whole concept of self-defense and defense of others? Again, it's a reasonable person

in the shoes of the accused, time of the incident. You are the reasonable people. And even if a person can act upon appearance of such danger whether it's real or apparent, and again, I am suggesting in this situation it's real. But even if it was just apparent, a person could act under those situations and the homicide would be justifiable and not unlawful.

And more importantly, the burden of proof with regards to whether or not the homicide was justifiable is on the prosecutor.

Let me read you this. Upon a trial of a charge of murder, it is a defense that the homicide was justifiable. In other words, in self defense or defense of others. The burden is on the prosecution to prove beyond a reasonable doubt that the homicide was not justifiable. If there is a reasonable doubt, I have a doubt reasonable whether the homicide was justfiable, the defendant is entitled to a judgment of acquittal. The question again now is reasonable. What is reasonable? How do you determine what's reasonable?

It's very difficult to step into the shoes of a person. Because we're looking at it in hindsight, in retrospect. Would be wonderful if we had a retrospectroscope we could go back and have a movie camera of every possible angle of this event and then we would know what is reasonable. But we're all limited, so we've got to try and figure out was Freddie's action reasonable. Yes? No? Okay.

Let's assume that you say no, that he overreacted to the situation. He overreacted to the situation. I mean, prosecutor talked about these guys small 5-7, 130 pounds, 105 pounds, that when it's focusing in and he shot, it was unreasonable. Okay. It's a possibility. That's a possibility.

But even if that belief is unreasonable, the other question, was it an honest belief? A person who kills another person in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury kills unlawfully but does not harbor malice.

It's again the absence of malice and therefore cannot be found guilty of murder. This would be so even though a reasonable man according to this man or woman in the same situation seeing and knowing the same facts would not have had the same belief. Such an honest but unreasonable belief is not a defense to the crime of voluntary manslaughter. So even if the belief was unreasonable, he overreacted if it was an honest belief. I could get hurt. In fact, we know someone was hurt. It's an honest belief. Creates the absence of malice. It's a manslaughter. The other guidelines with regards to self-defense, what assault is, it's justifiable. Becomes justifiable when the person doing the killing has a reasonable ground to believe and does believe that there is imminent danger that the other person will kill him or cause great bodily injury and that it was necessary to kill the other person to prevent this great bodily injury or death.

Actual danger or great bodily injury is not these, the bare fear of death or great bodily injury is not sufficient, but in order to justify a killing, it must be established that the circumstances must be sufficient to excite the fears of a reasonable person that there was imminent danger or great bodily injury and the party killing must have acted under the influence of such fears alone and under the belief that such killing was necessary to save themselves from death or great bodily injury.

Those are questions that you have to ask yourself putting yourself in the shoes of Fred Sandoval on that early morning of October 14th. That's what you have to address yourself to.

The other things you have to address yourself to in deciding the reasonability of it, if somebody's coming at you with a knife and you don't know what the other people in fact have in their hands, and we will get into the facts later, it's dark, things are happening quickly. You just got out of your car. You are standing by your car. How

much force? What's the proper round of force? The law is that you can use all the force that's necessary, that's reasonably necessary to a reasonable person, including killing the other person, including killing the assailant. And you don't have to retreat. The prudent thing might have been to turn tail and run.

And you can say well, gee, I would have run in that situation. Okay. It's possible. But the law with regards to self-defense is that a person who is threatened with attack need not retreat. Can stand their ground and defend with all force necessary and the means that would appear necessary to a reasonable person in a similar situation.

The law applies, even though the assailed person might more easily have gained safety by flight or withdrawing from the scene. So again, here is an absolute right to stand your ground. And the same applies to the defense of another person. These rules apply to to self-defense and defense of another person.

The hard part is the hindsight. We are going to go try and put ourselves in Freddie's shoes. But you have to look at it when you are doing that what appeared to Fred Sandoval at that time and at that place or what would appear to you as reasonable people in his exact shoes, getting out of his car at that exact time. What would have appeared to you?

You have to consider again the factors of the time, of the speed of which things are happening, the lighting or lack of lighting, because we know from the officers that the lights in here were out. The only light that was functioning was the East Standard. These were dark. And it's almost 3 o'clock in the morning. The movements of people.

Again, people aren't frozen in stone. We have to put yourself in Freddie's shoes and consider the people are moving around. They are moving around very quickly. The number of people moving around. You know, how

do you keep track? The placement of people. And whether some of these people had drugs in their system and the effects that those drugs would have. That's a big, big factor, in fact.

The prosecutor has made a very, very big issue. Here is Big Fred.

Stand up for a second, Fred.

He is a big man. Big guy. Beefy guy. I am 6 feet, 192 pounds. I have lost a little weight since I was playing football.

Gilbert Martinez was what, 5-7, 135. Anthony Aceves was 5-6, 5-5, 105, whatever. How would these people attack a guy like him? The fact of the drugs. It happens every single day.

I clipped an article out of the LA Times because I thought I was going to argue yesterday and I didn't. But February 3, 1987—

MR. MILTON: There would be an objection to the article.

MR. APPLEBAUM: I can read articles.

THE COURT: Objection is sustained.

MR. APPLEBAUM: Every single day in the newspapers you will see person on PCP attacks police officers. You think size means anything to a person who is cooled out on PCP? Would you attack a police officer if you were in your right mind? I mean, officers wearing a baton? He is wearing a gun? Carrying stun guns? I wouldn't. Because you know you are going to get shot dead. That's the last thing you'd do.

And I don't care if you are Godzilla. You still wouldn't attack that police officer because he has got a gun. Every single day it happens. Person is loaded on PCP attacks police officer. Police officer shoots person. Person feels no pain and keeps coming. Officer shoots him again. Person feels no pain and keeps coming and police officer shoots him again and he is dead. Every single day in this community. That's sad. Because this drug is killing our youth.

The difference of this banquet last night of seeing youngsters who are doing well in school and doing well in sports and seeing the tragedy of these kids totally spaced out on PCP and it's night and day.

You think that David Martinez, I mean Gilbert Martinez and Anthony Aceves would attack Freddie Sandoval and Pelon? You bet they would. Because they had enough PCP in their system. They had no thought process to stop them. Just like the person who goes after the police officer with a gun in his hand. Size is meaningless.

Do I have a doubt and is that doubt reasonable? Going down the line to each and every charge and each and every element of each and every charge. Do I have an abiding conviction? This is what you ask yourself.

Reasonable doubt is the state of the case which after the entire comparison and consideration of all the evidence leaves your minds in the condition that you cannot say you feel an abiding conviction to a moral certainty of the truth of the charge. An abiding conviction, abide. To live with. Abode. Comes from the word "house." Abode. To live with. You live in your house.

Do I have an abiding conviction to a moral certainty of the truth of the charges? You have to think about when you go in, and do I have a doubt and is the reasonable, about what that means. Something that has to stay with you.

If you go in and vote on a conviction, let's say second degree murder, manslaughter, the park charges October 14th and next week or next month or even next year, you think you have been thinking about it on and off. You say, you know, I really do have a doubt. The more I think about it, I have a doubt. Reasonable doubt. You know, I have doubts about this case. Well, then it hasn't lived with you. The strength of your conviction to a moral certainty hasn't lived with you, an abiding conviction to a mortal certainty. That's what the standard is.

So when you go into the jury room, I suggest don't look at it just in the terms of here and now. Think about

over time. That's what the law is. So I am suggesting in terms of analizing the facts, once you determine what the facts are, start at first degree murder. Do I have a doubt? Is it reasonable?

Go to second degree. Do I have a doubt? Is it reasonable? Consideration now premeditation and deliberation and whether there is malice or the absence of malice. And with second degree, then consider heat of passion. Sudden quarrel. See if it goes to manslaughter.

Consider self-defense and defense of others and the reasonableness of that response. That's another way of second degree going on. Or if it's reasonable, then it becomes justifiable. Do I have a doubt. is that doubt reasonable?

Let's take a look at the facts of this case. There is really three categories of witnesses with regards to the Belvedere Park case, the October 14th case. People were actually in the park, eye witnesses. Some of them eye witnesses to more events than others. But actual witnesses in the park.

* * * *

DEFENSE COUNSEL ARGUMENT

If, after a consideration of all of the evidence, you have a reasonable doubt that the defendant was present at the time the crime was committed, he is entitled to an acquittal.

You have got that instruction. You will get it again in the jury room. You take that instruction and you look at that, along with the presumption of innocence and you have to come to this decision now as to whether the people met its burden of proof or not. Did they prove to you the truth of the charges beyond a reasonable doubt or not?

Now something else that I think was touched upon by Seymour that it's a decision when you say beyond a reasonable doubt and to a moral certainty. That means

forever. That doesn't mean just today or the mood you are in today. That means a decision that you are going to live with forever. And it's probably, if not the most important decision you will ever make, certainly way up there on the list. Now—

THE COURT: Ms. Kopple, would this be a good time to break?

MS. KOPPLE: Yes.

THE COURT: We will take lunch now until a quarter of one. In the meantime, don't discuss this case among yourselves or with anyone else or form or express an opinion until this matter is finally submitted to you.

See you back in your chairs ready to go quarter of one.

(Lunch recess.)

THE COURT: People versus Sandoval. Let the record reflect defendant is present with counsel; deputy district attorney is here. All the jurors and alternates are here.

You may continue, Ms. Kopple

MS. KOPPLE: Thank you, Your Honor.

Good afternoon.

There were a couple of points that I wanted to bring up to you before we go on further. Deputy Birtness and Deputy Caballero testified in the rebuttal case of the prosecution that they were assigned to keep Ralph Ortega's car under surveillance on November 1st.

The importance of their testimony is that Ralph wasn't in the car when they stopped the car, and when they kept it under surveillance. And you can be sure that if he were in that car, you would have heard it from them.

They were asked questions. Birtness was asked questions about whether, in fact, he was given the name by the prosecution or the detectives here was the name of the person Ralph Ortega. He said no, that name was not familiar to him.

The description of the male Latin who was, I think, 5 foot 8, something like that, 150, 160 who was driving the car was not the description of Ralph Ortega. Ralph

was bigger. He is over 6 feet. Weighed 210, something like that, very close in size to Freddie.

So Caballero, who is the female officer, followed his car over to a drive-in movie. And she finally gave up surveillance, could really add nothing more.

It's what they didn't add that's important. Ralph was not in that car. And the reason he wasn't in that car, his Monte Carlo, was because he was in the Camaro coming back from Tecate that weekend.

I could spend another hour or two or three going over each and everything that Ralph said that Sandra said that Terry said. You remember it. You heard. If there is anything more you need to hear, you are always able to get the testimony read back to you.

You were able to observe the credibility of these witnesses, and now it's in, the ball is in your court.

There were some things mentioned in the argument by the prosecution having to do with this photograph showing the attic at the Wells' house. And he said there was no proof that they were wholesale drug dealers. And so what if they were? It wouldn't even be relevant. Those were his words.

Well, I submit to you that it would be very relevant if they were dealing in dope because that would give a motive to many other people to want to have killed Ray Wells.

MR. MILTON: There is an objection.

THE COURT: Overruled.

MS. KOPPLE: That is a factor for you to consider when you take the pieces of evidence about what the police found and what they lost or didn't keep track of from the Wells' home. And that's something that you have to make a determination of, bearing in mind that Freddie Sandoval does not have to prove to you nor do I nor does Seymour Applebaum have to prove to you who did the killings.

The prosecution is the one who has to prove to you beyond a reasonable doubt who is guilty of these charges. And if he can't do it because he doesn't have the evidence,

then you have no choice but to vote for an acquittal. It is not up to either side or not up to the defense to show you who, in fact, it was. I can't say to you it was Bennie or Sal Rubio or some disgruntled customer. It could have been anybody.

But the evidence does not support the proposition that Freddie did it, and that's a matter for your determination. But that is the evidence as I view it.

Now there is another instruction, one of the important instructions that the judge read to you and that you heard a definition of, a confession and an admission and what it is. And it's very clear from the instruction as to what is a definition of a confession or an admission.

But it says you are the exclusive judges as to whether the defendant made a confession and if so, whether such statement is true in whole or in part. If you should find that the defendant did not make the statement, you must reject it. If you find that it is true in whole or in part, you may consider that part which you find to be true.

Now there is another very important paragraph down here. Sorry for those on the end, but I will read it.

Evidence of an oral confession or oral admission of the defendant should be viewed with caution. There is a reason this paragraph is here. The people who wrote this instruction of law had people like Bennie Verduzco in mind. Think about it.

This case leans or falls, it falls within Bennie Verduzco's testimony. Because without him, they don't have a case.

Just so you don't think that this is the only time in history that this ever happens, it is a matter of common knowledge. And in this society and in the western world, unfortunately if we see the television, we hear the news, we read the newspapers, people aren't perfect. Human beings are not perfect. The world is not perfect. We don't all operate like a computer, and mistakes are made and false testimony is had, and innocent people are wrongfully convicted.

* * * *

MS. KOPPLE: I think to anyone who reads the newspaper, sees the news on television, watches shows like 60 Minutes where they do investigative reporting that we are all familiar with cases in which, for various reasons, innocent men get convicted of crimes, murder, robbery, all sorts of crimes.

I think that probably a couple of the more famous cases and that have even come to mind more recently is an engineer in Texas named Lenell Geter. They made a movie about him last week, and this was on television. This was a man who had testimony about being other places other than the crime and he was convicted. Eventually, this matter was resolved.

There are all kinds of cases where informants testify. They are later found to be telling lies. People are convicted. They are prosecuting witnesses like in the very well known Gary Datson case from Lima, Ohio where the woman testified that he was the rapist and the man went to prison. And we saw this on the news. We saw them on television after she recanted. Everybody knows about those cases.

The point that I am trying to make is to be careful and to be aware, to really pay attention and to be aware of what's going on here because you have got a man like Bennie Verduzco upon whom the prosecution is resting its case.

This is a decision that you are going to have to live with forever. And when you are back there in the jury room, you are going to have all those instructions and all the testimony and all the bits of phsyical evidence.

You will have the little blue mouse costume or the little blue rat costume. You can check. You can see it's hand made.

The photo of Freddie and John Walters and Sandra down in Tecate. You will have the little slip of paper with his name and these DMV papers which have Betty Phipps name on them, but they don't have anything connecting Alfred Sandoval to that car, to those papers.

It's like Seymour Applebaum told you before. He said just keep examining your doubt. Say "do I have a doubt and is it reasonable?" Because down the road a few weeks from now, a month from now, you are going to be having this conversation with someone close to you. You are going to be relaying probably some of your feelings, your thoughts, your views on the evidence and how this case proceeded through the trial court, what your impression was of the case and how you viewed the evidence.

And you are going to, by that time have made up your mind as to the reasonable doubt and as to the presumption of innocence and as to whether or not the prosecution's made its case. That is going to be a factor that's in your hands now.

And Freddie Sandoval thanks you, Seymour thanks you, and I thank you.

* * * *

DISTRICT ATTORNEY ARGUMENT

There is that instruction that's always a struggle, proof beyond a reasonable doubt. People have to prove it. It's read to you all the time. And whatever explains it beyond that.

And I have another story that might help you there. Might help you with proof beyond a reasonable doubt. I will make it a short one.

This is about a farmer who has been accused of adding water to his milk. One of the villagers went to the sheriff and said, "sheriff, farmer John is adding water to his milk."

Proof beyond a reasonable doubt? Of course not. But the sheriff decides, "Well, I have to do something about this allegation. I have to investigate this to see if there is any basis for it."

So the sheriff goes out to farmer John's farm and he takes up a position of surveillance. And he looks in the barn area and he sees the door open and he sees farmer John come out of the barn with one of those milk cans.

You know, the old metal milk cans about this high with the round top and the handles up here the top and along base? He saw farmer John carrying one of those out of the barn and put it up on his truck. And he saw farmer John go back into the barn, disappear. Presumably cows are in there. Comes back with another milk can and puts it up on the truck. And he does that a number of times, and he has got a bunch of them on the truck.

He sees farmer John get in the truck and drive off toward town. And this is market day and market day to sell the milk.

And the sheriff says, "I don't see anything unusual about that. There are cows in the barn. He loads the cans of milk on the truck and he is going to town to sell his milk."

The the sheriff sees farmer John's truck stop by the creek. And he sees farmer John get out of the truck and go around to the back of the truck, take one of the cans off of the back of the truck and walk down the creek bank. And now all we can see is this part of farmer John because the bank is hidden by the bottom part of him. He is lower down by the water.

He knows farmer John is holding the can. And he sees farmer John bend down like this and go out of sight and come back up and then walks back up and put the can back on the truck.

Proof beyond a reasonable doubt farmer John is adding water to the milk? It's awfully suspicious, but maybe not proof beyond a reasonable doubt. So the sheriff decides to follow farmer John into town. And he now sees farmer John about to sell his milk to people. And he walks over to farmer John's truck and he inspects the cans and they are all wet because he saw him do this to every can when he was at the creek, bend down and bring it up, put it back on the truck, and they are wet.

Proof beyond a reasonable doubt that farmer John is adding water to the milk? Again, awfully suspicious, but maybe farmer John was washing the excess milk off the outside of the can so he can sell them.

Well, the sheriff takes one of the cans of milk off the truck, sits it down. He looks in the can and he sees bubbles like maybe something was added to it. Proof beyond a reasonable doubt that he is adding water to the milk? Well, maybe that was from the turbulence the truck drives over.

He looks in the can and sees some separation. Maybe that's the cream of the milk separation.

He looks in the can again. Fish in the can. Proof beyond a reasonable doubt? You betcha. You betcha.

Plug it in here. What do we have here? Look at the physical evidence in the park. The blood trail, the blood comparisons. The casings, the bodies, where they were positioned, the '68 Chevy Caprice, Frank Bender, the DMV switch, Verduzco, the motive to kill.

Read that motive instruction. The motive to kill Ray and Marleen, the motive to kill Ray and then a separate motive to kill Marleen. "I did her, too, because she saw me. I did him because he is a big mouth. I sent them to heaven with the angels."

That motive to kill. You know what? The defendant left a trail of evidence.

* * * *

(REASONABLE DOUBT INSTRUCTIONS GIVEN AT PENALTY PHASE)

CALJIC 2.90 (Modified)

As to any crime or criminal act of which defendant is accused as a factor in aggravation, he is presumed innocent until the contrary is proved beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of any crime or criminal acts of which defendant is accused used an an aggravating factor.

CALJIC 8.84.1.1 (1983 New)

Evidence has been introduced for the purpose of showing that the defendant has been convicted of the crime of assault with intent to commit murder prior to the offense of murder in the first degree of which he has been found guilty in this case.

Before you may consider such alleged crime as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant was in fact convicted of such prior crime. You may not consider any evidence of any other crime as an aggravating circumstance.

CALJIC 8.84.1.2 (Modified)

Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts which involved the express or implied use of force or violence or the threat of force or violence:

1) Exhibiting a firearm in a rude, angry or threatening manner in the immediate presence of Deputy Sheriff Randall Prestwich, a peace officer, in violation of Section 417(b) of the Penal Code and

2) Assault with a deadly weapon or instrument or by means of force likely to produce great bodily injury on Guy Walker in violation of Section 245(a)(1) of the Penal Code, or

3) Battery with the infliction of serious bodily injury on Guy Walker in violation of Section 243(d) of the Penal Code.

Violations of Penal Code sections 245(a)(1) and 243(d) are different statements of the same act—the alleged assault on Guy Walker in the County Jail—and can constitute only one factor in aggravation.

Before you may consider any of such criminal acts as an aggravating circumstance in this case, you must be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal acts. You may not consider any evidence of any other criminal acts as an aggravating circumstance.

SUPREME COURT OF CALIFORNIA

[No. S004765, Crim. No. 26405, Dec. 14, 1992.]

THE PEOPLE,
Plaintiff and Respondent,

v.

ALFRED ARTHUR SANDOVAL,
Defendant and Appellant.

SUMMARY

Defendant was convicted of four counts of first degree murder (Pen. Code, § 187), with a multiple-murder special-circumstance finding (Pen. Code, § 190.2, subd. (a)(3)), and one count of attempted murder (Pen. Code, §§ 187, 664). The jury also found that defendant had personally used a firearm in the commission of each offense (Pen. Code, § 12022.5). Defendant had fatally shot two men and had wounded another man during a gang-related confrontation in a park, and had fatally shot a man and a woman in their home approximately two weeks later. The jury returned a verdict of death for the murder of the woman, and verdicts of life imprisonment without possibility of parole for the murders of the three men. (Superior Court of Los Angeles County, No. A760386, Richard P. Kalustian, Judge.)

The Supreme Court affirmed the judgment. As to guilt phase issues, the court held that the trial court did not err in denying defendant's motion to sever, in admitting evidence of defendant's gang affiliation, or in excluding evidence of the alleged culpability of third parties. The court also held that defendant's prior conviction of as-

sault with intent to commit murder was properly admitted for impeachment, and that the trial court properly refused to rule, in advance of defendant's testimony, on his request to limit the scope of cross-examination. The court further held that the prosecutor did not commit misconduct in cross-examining a defense expert as to his bias and suggesting to the jury that the expert was a liar, but that the prosecutor did engage in nonprejudicial misconduct by denigrating defense counsel during closing argument.

As to the penalty phase, the court held that the prosecutor did not improperly cross-examine a defense witness concerning defendant's gang membership, and that the trial court did not err in refusing to give defendant's proposed instruction that age could be considered only as a mitigating factor. The prosecutor did not engage in misconduct, the court held, when he argued the effect of defendant's crimes on the victims and their families, but did engage in nonprejudicial misconduct by paraphrasing a biblical passage in support of the death penalty. The court further held that the trial court did not abuse its discretion in refusing to declare a mistrial due to jury deadlock, or in requiring a separate penalty verdict as to each murder victim. (Opinion by Panelli, J., with Lucas, C. J., Kennard, Arabian, Baxter and George, JJ., concurring. Separate concurring and dissenting opinion by Mosk, J.)

OPINION

PANELLI, J.—Defendant was convicted by a jury in the Los Angeles County Superior Court of four counts of first degree murder (Pen. Code, § 187)[1] with a multiple-murder special-circumstance finding (§ 190.2, subd.(a)(3)), and one count of attempted murder (§§ 664/187). The jury also found that defendant personally used a firearm in the commission of each offense (§ 12022.5).

[1] All statutory references hereafter are to the Penal Code unless otherwise indicated.

The jury returned a verdict of death as to the conviction of murder of Marlene Wells and verdicts of life without possibility of parole as to the convictions of murder of Gilbert Martinez, Anthony Aceves, and Ray Wells. The appeal is automatic. (§ 1239, subd. (b).)

Guilt Phase Facts

Prosecution Case

1. *Belvedere Park Murders.*

About 2:30 a.m. on October 14, 1984, Adela Rodriguez and a group of girls(Zebba, Susie, Dianne, Corine, and Yvonne), along with Gilbert Martinez and Manuel Torres, drove to Belvedere Park in East Los Angeles. Anthony Aceves and a man named Jack drove to the park in another car. Once there, the group broke up into couples. Adela walked off with Gilbert Martinez.

Adela and Gilbert started walking back to the car after Zebba called for them to return. A fight was about to start near the car between people Adela did not know. As Adela was getting in the car, Gilbert said, "Let me get my friends first." As Gilbert approached his friends, Adela saw defendant shoot Gilbert in the head at close range. Defendant also shot Anthony in the head, and he shot at Manuel as the latter ran away. Defendant turned and pointed the gun at Adela and her friend Susie. Susie backed the car out, and drove off. Defendant's car followed them for a short distance. The girls then returned to the park to check on their friends. Gilbert died in Adela's arms.

Susie Martinez testified that she drove Adela and the others to Belvedere Park on October 14, 1984. She walked around the park with Anthony Aceves until they were called back to the car. When they arrived at the car, she saw Carlos Tostado fighting with someone. The fight stopped, and she noticed defendant standing next to a brown Monte Carlo arguing or talking with Anthony.

Gilbert was nearby. Defendant pulled out a gun and shot Gilbert and Anthony in the head. After Gilbert fell to the ground, defendant shot him again. Susie did not see Gilbert or Anthony with any weapons, nor did she see them make any aggressive gestures.

Carlos Tostado testified that he drove a white Monte Carlo to Belvedere Park on October 14, 1984. Several friends were with him. Another car drove up with four young women and three men. Tostado fought with one of the men. As the fight was breaking up, defendant, also known as "Chato," and Eugene Valenzuela, also known as "Pelon," drove up in a tan Monte Carlo. Defendant got out of the car, grabbed one of the men by the neck and shot him. Tostado had known defendant for about 10 years and was a member of the same gang, Arizona Marivilla. The victims belong to a different gang, Mariana Marivilla.

Tostado admitted that he had lied to the police when he gave them statements on October 14, October 16, and December 12, 1984. He acknowledged that he was on probation for using phencyclidine (PCP) at the time of his testimony.

The prosecution read the preliminary hearing testimony of Manuel Torres, who had since died in an unrelated auto accident. He had gone to Belvedere Park in Susie's car with Gilbert Martinez and several young women. As they were getting into the car to leave, Gilbert stopped to talk to a group of people. Anthony Aceves left the car to "back up" Gilbert. Torres heard shots and saw Anthony fall to the ground. He himself was shot in the neck, but he did not see who shot him.

Deputy Sheriff Woodrow West went to Belvedere Park around 4 a.m. to investigate the shootings. He found a small pocket knife on the ground near the spot where Anthony Aceves had fallen. There were traces of blood on the knife. Deputy West also found five expended .22-caliber bullet casings.

Autopsies performed on the bodies of Gilbert Martinez and Anthony Aceves revealed that both alcohol (.09 percent) and PCP (.033 micrograms per milliliter) were found in Martinez's blood and that PCP (.042 micrograms per milliliter) was detected in Aceves's liver tissue. Since Aceves died three days after the shooting, the PCP levels in his liver and blood would have been higher at the time of the shooting.

2. *Wells Murders.*

Benjamin Verduzco had known defendant for about 16 years and had been a fellow member of Arizona Marivilla, but Verduzco no longer belonged. He agreed to testify in exchange for release from prison. He was placed in a protection program, given $600 a month for room and board, and was promised a name change.

On October 15 or 16, 1984, defendant asked Verduzco to keep a beige and brown Monte Carlo in his garage because he was in some kind of trouble. Verduzco agreed. Defendant left the car in Verduzco's garage and drove off with Eugene Valenzuela in a 1969 black Chevrolet Impala.

A week later, on October 24, 1984, defendant came to Verduzco's home. Ray and Marlene Wells arrived a few minutes later. Defendant asked to borrow $5 from Ray Wells and then left. That night, the police came to Verduzco's house and seized defendant's car.

On October 31, 1984, at 12:42 a.m., Frank Bender heard gunshots. He went to the front door of his house and looked across the street to the residence of Ray and Marlene Wells. He noticed that the Wellses' dog appeared frightened. He also saw a black 1968 Chevrolet Caprice parked nearby with the engine running.[2] Shortly there-

[2] Bender, who is a car buff, first told police it was a Chevrolet Impala. He determined it was a Chevrolet Caprice after examining a book of cars. The only difference between an Impala and a

after, he saw a silhouette cross the Wells yard and drive away in the car.

That same night, between 1 and 2 a.m., defendant called Benjamin Verduzco and said, "Bennie, I just did the big mouth in." When Verduzco asked, "Who," defendant said, "Remember the one who was there in the morning with the car." He referred to him as "R" and did not use a name. Defendant also said, "You know I take care of business. I had to do her, too." Defendant killed "her" because she saw him "do R." Defendant said, "They have gone to heaven with the angels." Defendant said he did it so that "they wouldn't be snitching no more."

Deputy Sheriff Robert Havercroft went to the Wells residence on the night of the murders. The rear door of the house was closed but not locked. He found Ray Wells's body on a couch in the living room and Marlene's body in the doorway between the dining room and kitchen. Deputy Havercroft found no evidence of theft, and no signs of forced entry.

Deputy Havercroft found three appointment books with many names and addresses. Attached to one of the appointment books were small pieces of paper. The names "Chato" and "Pelon" were written on one piece of paper, and the name "Moses Verduzco" was written on the other.

Betty Phipps sold a 1968 Chevrolet Caprice to defendant in October 1984. The car was not in running condition; defendant told her he was going to fix it up. On October 7, 1984, a black 1968 Chevrolet Caprice was stolen from the Los Angeles zoo. The stolen 1968 Chevrolet Caprice was stopped at the United States-Mexico border at Tecate on December 15, 1984, while Salvador Rubio, a member of the Arizona Marivilla gang, was

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Caprice was that the Caprice had chrome strips. He remembered the car because it was in excellent shape.

driving it. The license plate and vehicle identification numbers that were on the car did not belong to the car. One of the documents found in the glove compartment was a "pink slip" or ownership certificate with the name of Betty Phipps on the back.

Defense Case

1. *Belvedere Park Murders.*

The defense presented evidence from law enforcement officers and others regarding inconsistent statements given by Adela Rodriguez and the other young women on the night of the shootings. Zebba Rodriguez testified that when she was walking back to the car she saw Gilbert Martinez, Anthony Aceves, and Manuel Torres arguing with about three other men. She was afraid, got in the car, heard shots, and ducked until she heard no more shots. When she raised her head, she saw Gilbert and Anthony lying on the ground. She did not see who had done the shooting.

David Martinez testified that he went to Belvedere Park on the night of the shooting with Carlos Tostado. He and Tostado had spent the day cruising, drinking beer and smoking PCP.

Dr. Griffith Thomas, a pathologist, testified that PCP can cause very bizarre and aggressive behavior. The amount of PCP in the victims' bodies would correlate with bizarre behavior. Dr. Donald Trockman, a forensic psychiatrist, testified that persons with amounts of PCP in their systems such as the victims showed were "unpredictable people" and that they "may attack you and try to kill you."

2. *Wells Murders.*

Detective Gene Hetzel interviewed Benjamin Verduzco on November 1, 1984. When he told Verduzco that the Wellses had been murdered, Verduzco appeared surprised

and shocked. Verduzco did not mention that he had received a phone call from defendant on the night of the murders. He did not tell police about the phone call until much later.

Ralph Ortega testified that he went to a ranch in Tecate, Mexico with defendant and several other people on October 24, 1984. Artega went back to Los Angeles and returned to Tecate with his wife and children on October 30, 1984. Defendant was still there. The next evening, October 31, Halloween, defendant and some others took Ortega's son trick-or-treating.

GUILT PHASE CONTENTIONS

1. *Denial of Motion to Sever Counts.*

Defendant contends that the trial court erred in denying his motion to sever the Belvedere Park murders from the Wells murders. He argued for severance on the basis that the incidents were unrelated, not cross-admissible, and that the evidence in the Wells charges was far weaker than that in the Belvedere Park charges. The court denied severance based on the prosecutor's representation that Benjamin Verduzco would testify at trial and provide evidence of defendant's motive and premeditation concerning the Wells murders that linked them with the Belvedere Park murders.

Defendant renewed his motion to sever shortly before trial was scheduled to begin. The trial court denied the motion, again in reliance on the prosecutor's representation about Verduzco's anticipated testimony.

Section 954 provides in pertinent part: "An accusatory pleading may charge two or more different offenses . . . of the same class of crimes or offenses, under separate counts . . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be

tried separately or divided into two or more groups and each of said groups tried separately. . . ."

The statutory requirements for joinder were met here because both incidents involved the same class of crimes —murder. Since the requirements for joinder were satisfied, defendant can predicate error only on a clear showing of potential prejudice. (*People* v. *Johnson*, (1988) 47 Cal.3d 576, 587 [253 Cal.Rptr. 710, 764 P.2d 1087].) "The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (*People* v. *Bean* (1988) 46 Cal.3d 919, 938 [251 Cal. Rptr. 467, 760 P.2d 996].)

"The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reivewing a motion to sever trial." (*Frank* v. *Superior Court* (1989) 48 Cal.3d 632, 639 [257 Cal.Rptr. 550 770 P.2d 1119].) Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns it into a capital case. (*Ibid.*; see also *Williams* v. *Superior Court* (1984) 36 Cal.3d 447, 453 [204 Cal.Rptr. 700, 683 P.2d 699].)

Defendant bases his argument for prejudice primarily on the absence of cross-admissibility of the two sets of offenses. He argues that the trial court's reasoning did not establish that the evidence of the two separate incidents would have been admissible in its entirety had there been separate trials. According to defendant, all it es-

tablished was that there would have been some minor evidentiary crossover as to the two incidents. However, even if defendant is correct on this point, it is now clear tht cross admissibility is not the sine qua non of joint trials. (*People* v. *Mason* (1991) 52 Cal.3d 909, 934 [277 Cal.Rptr. 166, 802 P.2d 950]; *Frank* v. *Superior Court*, *supra*, 48 Cal.3d at p. 641; *People* v. *Poggi* (1988) 45 Cal.3d 306, 321 [246 Cal.Rptr. 886, 753 P.2d 1082].) "While we have held that cross-admissibility ordinarily dispels any inference of prejudice, we have never held that the absence of cross-admissibility, by itself, sufficed to demonstrate prejudice." (*People* v. *Mason*, *supra*, 52 Cal.3d at p. 934.) "That the evidence would otherwise be inadmissible may be considered as a factor suggesting possible prejudice, but countervailing considerations that are not present when evidence of uncharged offenses is offered must be weighed in ruling on a severance motion. The burden is on the defendant therefore to persuade the court that these countervailing considerations are outweighed by a substantial danger of undue prejudice." (*People* v. *Bean*, *supra*, 46 Cal.3d at p. 939).

Defendant did not carry that burden. The potential prejudice he asserted did not rise to the level of demonstrating that the court's denial of severance was an abuse of discretion. The court recognized that the anticipated testimony by Verduzco added significantly to the strength of the Wells case, thereby obviating the danger of a "spillover" effect from the Belvedere Park evidence. Indeed, the court suggested that it would reconsider the severance motion if the prosecution were not able to secure Verduzco's testimony. The inflammatory effect of defendant's gang membership as to the Belvedere Park case was neutralized by the fact that the victims were also gang members. Moreover, this was not a case in which capital charges resulted solely from the joinder of the two incidents. (Cf. *Williams* v. *Superior Court*, *supra*, 36 Cal.3d at p. 454.)

Defendant also made passing reference to the fact that he had separate defenses that would be prejudiced because he desired to testify as to one incident but not the other. Although we have not addressed this theory of prejudice, it has been considered by federal courts. The federal courts have ruled that severance is not mandatory every time a defendant wishes to testify to one charge but not to another. " 'If that were the law, a court would be divested of all control over the matter of severance and the choice would be entrusted to the defendant.' " (*U.S.* v. *Archer* (7th Cir. 1988) 843 F.2d 1019, 1022.) The need for severance does not arise in federal courts " 'until the defendant makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other.' " (*Ibid.*; quoting *Baker* v. *United States* (D.C. Cir. (1968) 401 F.2d 958, 977 [131 App.D.C. 7]; see also *United States* v. *Valentine* (10th Cir. 1983) 706 F.2d 282, 291.) Federal courts have required the defendant to present enough information to satisfy the court that the claim of prejudice is genuine and to enable it to weigh the considerations of economy and expedient judicial administration against the defendant's interest in having a free choice with respect to testifying. (*United States* v. *Valentine*, *supra*, 706 F.2d at p. 291.)

Defendant's showing fell far short of anything that would have satisfied the federal standards or any standard this court might adopt. Defendant neither explained the nature of the testimony he wished to give in the Belvedere Park case nor his reasons for not wanting to testify in the Wells case. The trial court did not abuse its discretion in denying severance.

Because the issue is raised on appeal following trial, we must also consider whether, "despite the correctness of the trial court's ruling, a gross unfairness has occurred from the joinder such as to deprive the defendant of a fair trial or due process of law." (*People* v. *Johnson*, *supra*, 47 Cal.3d at p. 590.) Defendant claims gross un-

fairness occurred as a result of the destruction of his ability to testify as to one incident but not as to the other. He has done no more, however, than make a bald assertion to that effect. "One asserting prejudice has the burden of proving it; a bald assertion of prejudice is not sufficient." (*Id.* at p. 591.) We conclude, therefore, that defendant has failed to show that denial of severance deprived him of a fair trial.

2. *Use of Peremptory Challenges.*

Defendant contends that the trial court erred in permitting the prosecutor to systematically exercise his peremptory challenges to excuse from the jury those prospective jurors who had expressed some scruples about imposition of the death penalty. Defendant acknowledges that we have addressed this contention on numerous occasions and have found no constitutional infirmity in permitting peremptory challenges by both sides on the basis of specific juror attitudes on the death penalty. (See, e.g., *People* v. *Caro* (1988) 46 Cal.3d 1035, 1061 [251 Cal. Rptr. 757, 761 P.2d 680]; *People* v. *Belmontes* (1988) 45 Cal.3d 744, 799 [248 Cal.Rptr. 126, 755 P.2d 310].) Accordingly, we reject defendant's contention.

3. *Evidence of Defendant's Gang Membership.*

Defendant contends that the trial court erred in admitting evidence of his gang membership because it was irrelevant and prejudicial to his defense. Defendant objected pretrial by moving to preclude the prosecutor from referring to his alleged gang membership during opening statements. The prosecutor argued that evidence of gang membership was relevant to prove the motive for the murders at Belvedere Park. The trial court ruled that the prosecutor had made a showing that the evidence was admissible and denied the motion.

Defendant later moved to strike the testimony of Carlos Tostado and Benjamin Verduzco on the ground

that the prosecutor had used them to put irrelevant and prejudicial testimony before the jury of defendant's alleged gang membership. The trial court denied the motion, ruling that the gang membership evidence had not caused undue prejudice.

Defendant argues that the evidence of gang membership was irrelevant and that the prosecutor never proved a gang-related motive for the shootings. We do not agree. The evidence established that the victims were members of a rival gang. The fact that the gangs purportedly had been at peace for seven years does not eliminate gang retaliation as a motive. Indeed, that appears to have been the only plausible motive. What we have here is a battle over turf. The Arizona Marivilla gang considered Belvedere Park to be its territory. The victims, members of a rival gang, were in Arizona Marivilla territory and were shot by a member of the Arizona gang without any other provocation.

Defendant argues that evidence of gang membership was found to be prejudicial and irrelevant in *People* v. *Cardenas* (1982) 31 Cal.3d 897 [184 Cal.Rptr. 165, 647 P.2d 569] and *People* v. *Perez* (1981) 114 Cal.App.3d 470 [170 Cal.Rptr. 619]. However, here, unlike *Cardenas* and *Perez*, the evidence was far more relevant. In *Cardenas* the prosecution introduced evidence of gang membership to prove bias of defense witnesses, but bias had already been established by other testimony. We held that the admission of gang membership evidence was an abuse of discretion under Evidence Code section 352 because the evidence was of minimal probative value, cumulative, and extremely prejudicial. In *Perez*, the evidence of gang membership had no relevance to any issue at trial. In this case, the court did not err in the admission of gang affiliation.

4. *Exclusion of Evidence of Third Party Culpability.*

Defendant contends that the trial court improperly excluded, pursuant to Evidence Code section 352, evidence of third party culpability as to the Wells murders. We find no abuse of the court's discretion to exclude such evidence.

Deputy Havercroft found a daily appointment book and two weekly planners at the Wells residence. The books contained many names and addresses. Two small pieces of paper were clipped to the daily appointment book. The names "Chato" and "Pelon" were written on one piece of paper, and the name "Moses Verduzco" was written on the other piece of paper. Defendant's nickname is "Chato."

The defense sought to prove that Ray Wells was the center of a violent criminal operation involving drugs and stolen cars and guns, and that any number of criminal accomplices or rivals could have killed him. Therefore, the defense sought to cross-examine Deputy Havercroft about the names found in the appointment book and weekly planners and to introduce those documents into evidence. After considerable argument and an offer of proof, the court ruled that the evidence was inadmissible because "it still does not point the finger at any individual nor does it rise at all above possible ground of suspicion."

A criminal defendant has a right to present evidence of third party culpability if it is capable of raising a reasonable doubt about his own guilt. This rule does "not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People* v. *Hall* (1986) 41 Cal.3d 826, 833 [226 Cal. Rptr. 112, 718 P.2d 99].)

The trial court properly found defendant's showing insufficient. The defense had no evidence of another person's actual motive to commit the crimes. Instead, the defense merely raised the possibility that others had a motive to kill Ray and Marlene Wells. Although the defense identified two persons with plausible motives, they had no direct or circumstantial evidence linking them to actual perpetration of the crimes.

The present case is similar to *People* v. *Edelbacher* (1989) 47 Cal.3d 983, 1017-1018 [25 Cal.Rptr. 586, 766 P.2d 1], where the defense sought to introduce evidence concerning the victim's association with "Hell's Angel-type people" and drug dealers in order to prove that someone other than the defendant committed the crime. We affirmed the trial court's ruling that the evidence was inadmissible. It did not identify a possible suspect other than the defendant or link any third person to commission of the crime, or even establish an actual motive rather than a possible or potential motive.

Defendant's reliance on *Crane* v. *Kentucky* (1986) 476 U.S. 683 [90 L.Ed.2d 636, 106 S.Ct. 2142] is misplaced. That case bears no similarity to the facts of the present case. *Crane* involved the exclusion of testimony regarding the circumstances surrounding the taking of the defendant's confession. The Supreme Court held that the ruling had denied the defendant a fair opportunity to present a defense.

As an additional basis for admission of this evidence defendant argues that the evidence was admissible pursuant to Evidence Code section 356. That argument is also unavailing. Evidence Code section 356 provides in pertinent part: "Where part of an act, declaration, conversation, or writing is given in evidence . . . any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

Contrary to defendant's contention, Evidence Code section 356 did not require admission of the appointment book and weekly planners. Those books simply were not part of a writing given in evidence by the prosecution. While the prosecution introduced independent slips of paper that were clipped to the appointment book, the book and the weekly planners themselves were unnecessary to an understanding of the slips of paper.

5. *Admissibility of Prior Conviction for Impeachment.*

Defendant contends that the trial court erred in ruling that his prior conviction for assault with intent to commit murder would be admissible for impeachment purposes. We do not agree. The court followed the analysis set forth in *People* v. *Castro* (1985) 38 Cal.3d 301 [211 Cal.Rptr. 719, 696 P.2d 111], interpreting article I, section 28, subdivision (f) of the California Constitution, which was enacted as part of Proposition 8 in 1982. It properly concluded that defendant's reliance on pre-*Castro* cases was not determinative and that defendant's conviction for assault with intent to commit murder involved moral turpitude. (*People* v. *Olmedo* (1985) 167 Cal.App.3d 1085, 1097-1098 [213 Cal.Rptr. 742].) The court then exercised its discretion under Evidence Code section 352, concluding that the probative value outweighed the prejudicial effect. The court noted that it could not assess the impact of the prior conviction on defendant's testimony because no offer of proof as to that testimony had been made. Contrary to defendant's contention, the court did not state that an offer of proof was required and, indeed, noted that California law did not then require an offer of proof.[3] Because of the similarity

[3] We have since held that testimony by the defendant is a prerequisite to appellate review. (*People* v. *Collins* (1986) 42 Cal.3d 378, 383 [228 Cal.Rptr. 899, 722 P.2d 173].) The ruling here preceded our holding in *Collins*, which was to be applied prospectively only.

of the prior to one of the charged crimes, the court offered to sanitize the prior by allowing reference to the conviction only as a prior felony conviction. It did not abuse its discretion in doing so. (See *People* v. *Massey* (1987) 192 Cal.App.3d 819, 825 [237 Cal.Rptr. 734].)

Defendant's reliance on pre-*Castro* and Proposition 8 cases is unpersuasive. As we noted in *People* v. *Castro*, *supra*, 38 Cal.3d at page 312, the intention of the drafters of Proposition 8 was to "restore trial court discretion as visualized by the Evidence Code and to reject the rigid, black letter rules of exclusion" which had been grafted onto the code by our decisions. Accordingly, we find no abuse of discretion in the trial court's ruling.

6. *Request for Ruling in Advance on Scope of Cross-examination of Defendant.*

Defendant contends that the trial court's refusal to rule on the scope of permissible cross-examination if he took the witness stand to testify on the Belvedere Park murders violated his right to testify on his own behalf.

Before the defense rested its case, defense counsel told the court that defendant wished to testify about the Belvedere Park incident on October 14, 1984, but that he did not wish to testify about the Wells murders on October 31, 1984. Counsel asked the court to limit any cross-examination of defendant to the Belvedere Park charges. Counsel indicated that defendant would testify on the issue of self-defense but gave no further details as an offer of proof. Defense counsel argued that the two incidents were entirely separate and that the direct and cross-examination could therefore be limited to the Belvedere Park charges. The prosecution disagreed, asserting that there was evidentiary spillover regarding defendant's efforts to hide the beige and brown Monte Carlo in Verduzco's garage and Ray Well's apparent knowledge of the transaction. The trial court refused to make a ruling in advance of defendant's actual testimony, stating

"whether a defendant can effectively limit the cross-examination depends upon the direct examination and may not be known until he testifies. The law is that a defendant cannot artificially limit the cross-examination and direct examination."

Defendant has failed to show that the court's ruling was erroneous. None of the authorities cited is directly on point, and none would have required the ruling sought here. Indeed, there is authority supportive of the trial court's action. (See *People* v. *Keenan* (1988) 46 Cal.3d 478, 410-513 [250 Cal.Rptr. 550, 758 P.2d 1081]; *People* v. *Williams* (1988) 44 Cal.3d 883, 912-913 [245 Cal.Rptr. 336, 751 P.2d 395].) The court acted well within its discretion.

7. *Cross-examination of Dr. Trockman.*

Dr. Donald Trockman, a forensic psychiatrist, testified as an expert witness for the defense in support of the self-defense claim as to the Belvedere Park counts. Dr. Trockman testified that there was a high correlation between ingestion of PCP and unpredictable violence and hostility. Based on his review of the autopsy report of Gilbert Martinez showing bruises and high levels of PCP and alcohol in his blood, Dr. Trockman concluded that at the time of his death, Martinez was in an angry, aggressive, violent mood. He could not reach any specific conclusion as to the mood of Anthony Aceves because he had lived for three days after the shooting.

On cross-examination Dr. Trockman testified that the mental state reached under the influence of alcohol is different from the mental state reached under the influence of PCP. The prosecutor reminded the doctor that he had testified differently in previous cases where the person was charged with being under the influence of PCP and asked the doctor whether his answer was dependent on his function in the particular case.

The prosecutor asked Dr. Trockman if Gilbert Martinez was in a violently aggressive mood during his entire period of PCP intoxication, and was told: "The important time. The time when he confronted the accused in this case." The prosecutor then asked how he knew the victim had confronted the accused and whether the defense had told him what he had to accomplish to dispel the prosecution case.

The prosecutor also asked Dr. Trockman whether, by his testimony, he tries to affect the outcome of a case. The prosecutor queried whether the witness instructed attorneys on the questions they should ask for dramatic effect, to maintain the interest of the jury, and to dispel inferences of defense bias.

During closing argument the prosecutor referred to the doctor's admission that he had testified differently in other cases about the distinction between alcohol and PCP intoxication. Based on the admission the prosecutor stated that the doctor "is a liar."

Defendant contends that the prosecutor committed prejudicial misconduct in so questioning the doctor and in calling him a liar during closing argument. Although defendant objected to the questions on cross-examination, he raised no objection during argument to the prosecutor's use of the term "liar." Defendant has thus waived the latter point since any harm caused by this characterization could have been cured by a timely objection and an admonition. (*People* v. *Green* (1980) 27 Cal.3d 1, 27 [164 Cal.Rptr. 1, 609 P.2d 468].)

In any event, there was no prosecutorial misconduct. The prosecutor was entitled to question the doctor's testimonial consistency and possible bias. (*People* v. *Meneley* (1972) 29 Cal.App.3d 41, 60 [105 Cal.Rptr. 432].) Referring to testimony as "lies" is an acceptable practice so long as the prosecutor argues inferences based on the evidence and not on the prosecutor's personal belief.

(*People* v. *Edelbacher, supra,* 57 Cal.3d 983, 1030.) Closing argument may be vigorous and may include opprobrious epithets when they are reasonably warranted by the evidence. In this case, the prosecutor's argument was based on the evidence and amounted to nothing more than vigorous yet fair argument. (*Ibid.*)

Defendant's reliance on *People* v. *McGreen* (1980) 107 Cal.App.3d 504 [166 Cal.Rptr. 360] (overruled on other grounds in *People* v. *Wolcott* (1983) 34 Cal.3d 92 [192 Cal.Rptr. 748, 665 P.2d 520]) is misplaced. In *McGreen,* the prosecutor attempted to discredit the expert witness by showing that he had received B and C grades in graduate school and that the witness's membership in certain scientific societies was a sham. The trial court eventually foreclosed further cross-examination on these grounds. The prosecutor nevertheless persisted in the line of questioning and additionally asserted that the witness's testimony had been stricken in another case because it was "patently unbelievable." When asked for authority to support the admission of such evidence of the witness's "unbelievability," the prosecutor admitted he had none. Additionally, during argument the prosecutor suggested there had been an ethics investigation of the witness and characterized the witness as an habitual liar who prostituted his credentials for $50 an hour. (*Id.* at pp. 514-517.)

In no way was the cross-examination in this case comparable to that in *McGreen.* Here, the prosecutor elicited testimony tending to show bias by questioning the witness about his contrary testimony in previous cases and his interest in helping the defense. Such cross-examination was proper. (See *People* v. *Rich* (1988) 45 Cal.3d 1036, 1088 [248 Cal.Rptr. 510, 755 P.2d 960].)

8. *Cross-examination of Ralph Ortega.*

Defendant contends the prosecutor committed multiple instances of prejudicial misconduct during the cross-

examination of Ralph Ortega, defendant's alibi witness in the Wells case.

Ralph Ortega testified for the defense that he went with defendant, Eugene Valenzuela, and others to a small ranch in Tecate, Mexico on October 24, 1984. He testified further that he stayed four days and returned to Los Angeles while defendant remained at the ranch. Defendant was still there when Ortega returned around midnight on October 30. They stayed on at the ranch; defendant went with Ortega the next night, Halloween eve, to take Ortega's son trick-or-treating.

On cross-examination the prosecutor elicited from Ortega that he had been arrested about 5:45 a.m. on October 24, 1984, near the Mexican border. He established that Ortega was not released from custody until about 5 p.m. that evening. The prosecutor noted that this information had not been revealed during Ortega's testimony on direct examination and asked Ortega if defense counsel had tried to avoid this subject. The prosecutor made references to Ortega's decision to "fess up" because "I was on to you" and asked if defense counsel had explained to him that it was necessary to put defendant in Tecate around 10 or 11 a.m. on October 24. The prosecutor established that Ortega and his friends just "hung around" the ranch. The prosecutor also established that Ortega purchased and delivered food and supplies to defendant and Valenzuela during their entire stay in Tecate.

The prosecutor asked Ortega if counsel had explained to him that he would be liable as an accessory after the fact if he ever admitted that he knew that defendant had committed the Belvedere Park murders at the time he took defendant to Tecate. Ortega said no and denied any knowledge that defendant was involved.

Later, when questioning Ortega about his knowledge of the seizure of the 1968 Chevrolet Caprice at the border,

the prosecutor stated: "Are you going to stop your lying here in court?" Defense counsel objected to the prosecutor's yelling, but not to the question itself.

Defendant contends that the prosecutor committed misconduct by repeatedly suggesting that defense counsel had colluded with Ortega in the fabrication of Ortega's alibi testimony. In our view, the record, as described above, does not support the assertion. Moreover, defendant has waived the point by failing to object and request a timely admonition. (*People* v. *Green, supra,* 27 Cal.3d at p. 27.)

Defendant also claims that the prosecutor used his cross-examination of Ortega to express his own personal disbelief in Ortega's testimony. Defendant refers to the questions suggesting that Ortega was lying. Again, no objection was raised below, and the point is therefore waived since any harm could have been cured by a prompt admonition. (*People* v. *Green, supra,* 27 Cal.3d at p. 28.)

Defendant asserts that the prosecutor improperly tried to impeach Ortega with evidence of a drug arrest. Ortega was arrested as an accessory to murder in this case, but he was released from custody after one day and charges were never filed. When questioning Ortega about his arrest in this case, the prosecutor queried, "You were also arrested for something else, weren't you?" Defense counsel's objection was *sustained.* No admonition was requested or given. Under these circumstances, we fail to see how defendant could have been prejudiced by this question since the jury was already aware that Ortega had been arrested on the way to Tecate for possession of methamphetamines. Moreover, the jury was given the standard instruction (CALJIC No. 1.02) stating that a question is not evidence and that they should not guess what the answer might have been when an objection is sustained.

Defendant also contends that the prosecutor improperly questioned Ortega about his failure to volunteer his exculpatory information to the police prior to trial. Defendant asserts that the prosecutor was aware that Ortega had been arrested as an accessory and had exercised his constitutional right to remain silent. Indeed, Ortega explained that he had never told the police about the alibi because he had refused to be interviewed. On redirect Ortega explained that he had given his exculpatory information to the defense attorneys and their investigator a year before the trial. Therefore, even assuming that the prosecutor's questioning in this area amounted to misconduct, we conclude that defendant suffered no significant prejudice as a result of it.

Defendant complains about questions concerning remarks made in the elevator after Ortega's testimony on direct examination. The prosecutor, defense counsel, and Ortega had a conversation in the elevator as they left the courthouse. No jurors were present in the elevator. The following morning, defense counsel reopened direct examination and questioned Ortega about the conversation in the elevator. Ortega testified that the prosecutor threatened him and said "someone is going to jail behind this."

On cross-examination the prosecutor asked Ortega whether he (the prosecutor) had made the alleged threat in response to a question asked by defense counsel. When Ortega answered yes, the prosecutor asked if defense counsel had said "Well, how do you guys like what happened in there today?" Defense counsel objected and denied making the statement. The objection was overruled. Ortega responded that he had heard defense counsel say only, "What's up?"

Defendant argues that the prosecutor's question was asked in bad faith. The claim is supported by nothing more than defendant's bald assertion. No police officers who overheard the conversation were called as witnesses by either the prosecution or the defense. Since the record

contains no basis for branding the prosecutor's questioning as bad faith, we reject defendant's contention.

9. *Prosecutor's Argument.*

Defendant contends that the prosecutor committed prejudicial misconduct in a number of respects in addition to the claims that we have already discussed. First, defendant charges the prosecutor with improper attacks on defense counsel. During the course of his lengthy review of the testimony of virtually every witness the prosecutor referred to attempts by defense counsel to mislead the jury and, at one point, accused defense counsel of perpetrating a fraud on the court. The prosecutor also referred to defense theories and evidence as "ridiculous" and "nonsense." Defendant interprets the prosecutor's characterization of the defense testimony as lies and concoctions, to be an accusation of defense fabrication of evidence. Defendant also complains about the prosecutor's repeated references to defense counsel's reaction to particular testimony.

"A prosecutor may vigorously argue his case, marshalling the facts and arguing inferences to be drawn therefrom. (*People* v. *Fosselman* (1983) 33 Cal.3d 572, 580 [189 Cal.Rptr. 855, 659 P.2d 1144].) We have held he may not express a personal belief in defendant's guilt, in part because of the danger that jurors may assume there is other evidence at his command on which he bases this conclusion. (*People* v. *Bain* (1971) 5 Cal.3d 839, 848 [97 Cal.Rptr. 684, 489 P.2d 564].) We have also held it improper for the prosecutor to imply that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case. It is not necessary to find that such implication impinges upon defendant's constitutional right to counsel. (Compare *People* v. *Turner* (1983) 145 Cal.App.3d 658, 674 [193 Cal.Rptr. 614].) Instead it is sufficient to note that defendant's conviction should rest on the evidence, not on derelictions of his counsel. (*People* v. *Perry* (1972) 7 Cal.3d 756, 790

[103 Cal.Rptr. 161, 499 P.2d 129]; *Bain, supra,* 5 Cal. 3d at p. 847.) Casting uncalled for aspersions on defense counsel directs attention to largely irrelevant matters and does not constitute comment on the evidence or argument as to inferences to be drawn therefrom." (*People* v. *Thompson* (1988) 45 Cal.3d 86, 112 [246 Cal.Rptr. 245, 753 P.2d 37].)

Defendant objected to many, but not all, of the cited instances. For the most part, his objections were overruled. The court did, however, sustain his objection to the accusation of perpetrating a fraud on the court. It admonished the jury to disregard the comment, stating that there had been no perpetration of a fraud by any lawyer in this case. While we agree that many of the cited remarks were improper, we do not find them to have been prejudicial. The prosecutor was entitled to argue the inconsistencies in the evidence and even to characterize inconsistent testimony as "lies." (See *People* v. *Edelbacher, supra,* 47 Cal.3d at p. 1030.) Here, however, the prosecutor went beyond that point on several occasions, denigrating counsel instead of the evidence. Personal attacks on opposing counsel are improper and irrelevant to the issues. The prosecutor's reference to counsel's reaction to particular evidence was also improper for the same reason, but we do not interpret it as a charge of fabrication of evidence. All of these remarks were a small part of the prosecutor's very lengthy review of the evidence presented. They were clearly recognizable as an advocate's hyperbole. (See *People* v. *Poggi, supra,* 45 Cal.3d at p. 340.) Accordingly, we find no reasonable probability that the jury would have reached a more favorable result absent the objectionable comments. (*People* v. *Green, supra,* 27 Cal.3d at p. 36.)

Defendant also contends that the prosecutor committed misconduct because he expressed personal opinions regarding the defense case. Defendant refers to the prosecutor's statement that "I shake my head in disbelief every time I think about it [Ralph Ortega's testimony]." De-

fendant also makes reference to the prosecutor's statement: "They know the defendant killed those boys. And they know he killed Ray and Marlene Wells." Finally, defendant complains about the prosecutor's argument about the disparities between defense promises of proof in the opening statement and the trial evidence. Defendant waived all but the first point by failing to raise a timely objection at trial. (*People* v. *Green*, *supra*, 27 Cal.3d at p. 27.) As to the first point, the remark was made in the context of reviewing the discrepancies in defense testimony and was not likely to be understood as being based on anything outside the record.

Defendant further charges that the prosecutor committed misconduct by referring to defendant's failure to testify at trial. The prosecutor argued that he forestalled defense testimony by preemptively proving that defendant did not need glasses at the time of the Belvedere Park offenses: "I should not have proved to you earlier in the trial that he didn't need glasses at the time in the park, because then you would have heard, 'Well, I was in the park, and you can see all the witnesses say I didn't have any glasses on. And I saw one guy go do my friend in with a knife. And another one came to me, and I thought he was going to do me in. I ran over to help my friend and shot him, and I shot him twice. I saw the other one. I couldn't see good who was doing what to me, so I shot him. And the other one coming at me, I shot him, too, because I just couldn't see good.' That's what you would have heard." A defense objection under *Griffin* v. *California* (1965) 380 U.S. 609 [14 L.Ed.2d 106, 85 S.Ct. 1229] (*Griffin*) was sustained, and the court admonished the jury to disregard the prosecutor's comments to the extent they reflected on the defendant's not testifying. The prosecutor referred to the glasses again in his rebuttal, stating: "And I argued in my opening argument the fact that you would hear or you would have heard, had we given them a little rope to hang themselves, also you would have heard, 'Well, I couldn't see. I didn't have

my glasess on, so therefore that's why I shot this person and I had to shoot this person.' " The defense objection was overruled.

We believe that the court's initial admonition was sufficient to obviate any *Griffin* concern. To the extent that the rebuttal comment could be construed as a reference to defendant's failure to testify, in context, it was clearly harmless. The reference was a minor feature in this seemingly marathon argument.

Defendant contends that the prosecutor committed misconduct by referring to defendant's courtroom appearance (wearing a suit, wearing reading glasses, being cleanshaven) as a "ploy" and by asserting that defendant did not need to wear the glasses all the time during the trial. Defendant waived these points by failing to object at trial, since any harm could have been cured by timely objection and prompt admonition. (*People* v. *Green*, *supra*, 27 Cal.3d at p. 27.) In any event, these statements could not have had a prejudicial effect in light of the overwhelming evidence of the Belvedere Park killings.

In sum, we find no denial of due process or a fair trial as a result of any misconduct committed by the prosecutor. Both sides seemed unduly argumentative and personal on occasion, but such instances were not so frequent or severe as to detract from the jury's fair consideration of the evidence.

10. *Instruction on Reasonable Doubt.*

In a supplemental brief, defendant argues that the instruction on reasonable doubt, CALJIC No. 2.90, is constitutionally flawed, citing *Cage* v. *Louisiana* (1990) 498 U.S. —— [112 L.Ed.2d 339, 111 S.Ct. 328]. Similar challenges to CALJIC No. 2.90 were raised and rejected in *People* v. *Jennings* (1991) 53 Cal.3d 334, 385-386 [279 Cal.Rptr. 780, 807 P.2d 1009] and *People* v. *Johnson* (1992) 3 Cal.4th 1183, 1234-1235 [—— Cal.Rptr. 2d —— P.2d ——]. As we noted in *Jennings* and *John-*

son, despite use of the term "moral certainty" in CALJIC No. 2.90, the instruction does not suffer from the flaws condemned in *Cage* v. *Louisiana*, *supra*, 498 U.S. —— [112 L.Ed.2d 339, 111 S.Ct. 328].

Defendant also cites Justice Mosk's criticism of CALJIC No. 2.90 in his concurring opinion in *People* v. *Brigham* (1979) 25 Cal.3d 283, 292-316 [157 Cal.Rptr. 905, 599 P.2d 100]. Recognizing that CALJIC No. 2.90 is a verbatim copy of section 1096, Justice Mosk urged the Legislature to redraft the definition of reasonable doubt in section 1096 to make it intelligible to modern juries. The Legislature has not responded. As Justice Mosk recognized, such changes must come from the Legislature.

PENALTY PHASE FACTS

Evidence in Aggravation.

The penalty case-in-aggravation consisted of evidence of three prior crimes by defendant: 1) a 1978 assault upon a police officer; 2) a 1979 conviction of assault with intent to commit murder; and 3) a 1985 assault on a fellow jail inmate.

1. *1978 Assault.*

Deputy Sheriff Randall Prestwich testified that on May 13, 1978, he and his partner heard gunshots in the vicinity of Arizona Street in Los Angeles. They saw defendant and two other men run from a house. Defendant had a shotgun. Deputy Prestwich yelled at the men to freeze. The other two ran off, and defendant brought the gun up to his waist and flinched, as if he expected the gun to go off. Deputy Prestwich fired a shot at defendant and saw defendant flinch again. Defendant turned and ran. Deputy Prestwich caught him and arrested him for assault on a police officer.

2. *1979 Assault.*

Ernest Leos testified that on March 17, 1979, he and his son were in their driveway when Jesse Trujillo's car stopped in front of the driveway. Leos's son, Ernest, Jr., went over to the car and was shot while talking to someone in the car. Defendant was convicted of assualt with intent to commit murder for this shooting.

3. *1985 Assault.*

Deputy Sheriff Kenneth Salazar testified that on March 21, 1985, defendant was working as a trusty in the high security section of Los Angeles County jail. After defendant had finished passing out and collecting breakfast trays, he was ordered back to his cell so that Guy Walker could leave his cell to take a shower. Walker received a razor blade and soap and went into the shower. Defendant was then released from his cell to complete his duties.

Deputy Lujan saw defendant run into the shower area, approach Walker, and move his fist toward Walker's head. Deputy Salazar saw defendant run from the shower area to the toilet area. As he followed defendant, Deputy Salazar saw Guy Walker slumped on the floor with blood on his face. Deputy Salazar heard a toilet flush. When he reached the toilet area, defendant was standing over a toilet. Deputy Salazar found a small piece of razor in the doorway leading to the toilet area. Walker's injuries could have been caused by a razor blade.

Evidence in Mitigation

1. *Walker Incident.*

Guy Walker testified for defendant. He and defendant had several arguments in March 1985 because defendant had been named trusty and had the cell Walker wanted. Walker tried to cut defendant's throat and to stab him. That same week, defendant entered the shower area and they fought.

2. *In-custody Behavior.*

Deputy Sheriffs Ronald Hernandez and Anthony Campbell, assigned to the Los Angeles County jail, had never had problems with defendant. Defendant was helpful and friendly, and both deputies voted for him to be appointed a jail trusty.

3. *Defendant's Family and Friends.*

Patricia Solis struck up a friendship with defendant after she had been dismissed as a prospective juror in the case. She described defendant as an intelligent and sensitive person, who cared about other people, and loved his children.

Edward Dominguez had known defendant since 1976, when he opened his liquor store in the neighborhood. Defendant was always a gentleman and, on one occasion, prevented a fight in the store.

Richard Rodriguez, a gang consultant affiliated with the California Youth Authority, testified that although Arizona Marivilla was once a street gang, since 1982 it had been incorporated as a neighborhood association. Defendant participated in the youth program when he was released from prison in May 1984.

Defendant's wife and son described him as a nice, lovable man who is a good father.

Defendant's mother, Elizabeth Luna, testified that defendant's father, who had been abusive to her and the children, died when defendant was six or seven. Luna then "went wild," and began drinking and partying. Defendant became "the man of the house" upon his father's death, and he took care of his four brothers and sisters, even stealing on occasion so they could eat.

PENALTY PHASE CONTENTIONS

1. *Evidence of Gang Affiliation.*

Defendant contends that the erroneous admission of his gang affiliation in the guilt phase prejudiced him in the penalty phase because he had to call Richard Rodriguez to rebut that evidence and the prosecutor improperly cross-examined him.

As previously noted, Richard Rodriguez testified in mitigation that the Arizona Marivilla gang, which had been violent, was reformulated in 1982 as a neighborhood association with the goal of keeping the peace. He testified that after defendant left prison in 1984 he was not involved in gang activities and that defendant was working to keep young people out of gangs. On cross-examination the prosecutor asked Rodriguez if it was true that Arizona Marivilla was one of the most violent gangs in East Los Angeles and responsible for most of the murders in that area from 1975 to 1985. The prosecutor also asked if defendant was one of the most active members.

We find no error. First, we have already concluded that the evidence of defendant's gang membership was properly admitted at the guilt phase. Second, the prosecutor was entitled to attempt to negate the evidence in mitigation to the effect that the Arizona Marivilla was now simply a peaceful neighborhood association. (*People* v. *Thompson, supra,* 45 Cal.3d at p. 124.) It is well established that the prosecution may inquire of a defense reputation witness whether he has heard of acts or conduct by the defendant inconsistent with the witness's testimony so long as the People have a good faith belief that the acts or conduct about which they wish to inquire actually took place. (*People* v. *Siripongs* (1988) 45 Cal.3d 548, 578 [247 Cal.Rptr. 729, 754 P.2d 1306].)

2. *Consideration of Defendant's Age.*

Defendant contends that the jury was improperly allowed by the court and prosecutor to consider his age as a factor in aggravation. Defendant was 26 at the time of the offenses. The court rejected defendant's special instruction stating that if defendant's age were to be considered, it could be considered only as a mitigating factor. The court gave CALJIC No. 8.84.1, which permitted the jury to consider "the age of the defendant at the time of the crime" in determining the appropriate penalty.

During the penalty argument, the prosecutor reviewed the factors listed in CALJIC No. 8.84.1 and argued: "The age of the defendant at the time of the crime. He is obviously old enough to know the difference between right and wrong, and that's aggravation."

Defendant acknowledges that we have rejected attacks on the instruction given. (See, e.g., *People* v. *Rodriguez* (1986) 42 Cal.3d 730, 777-779 [230 Cal.Rptr. 667, 726 P.2d 113]; *People* v. *Lucky* (1988) 45 Cal.3d 259, 301-302 [247 Cal.Rptr. 1, 753 P.2d 1052].) As we noted in *People* v. *Lucky, supra,* at page 302, mere chronological age should not of itself be deemed either aggravating or mitigating: "In our view, the word 'age' in statutory sentencing factor (i) is used as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue any such age-relaed inference in every case. (*Ibid.*)

The court did not err in rejecting defendant's proposed special instruction, since it stated that inferences relating to defendant's age could be considered only as a mitigating factor. Nor was there any impropriety in the prosecutor's argument. The prosecutor's argument that defendant was old enough to know better, thus making it aggravating, is an age-related inference that has been found

permissible in a number of cases. (See *People* v. *Bonin* (1988) 46 Cal.3d 659, 704-705, fn. 6 [250 Cal.Rptr. 687, 758 P.2d 1217]; *People* v. *Brown* (1988) 46 Cal.3d 432, 456-457 [250 Cal.Rptr. 604, 758 P.2d 1135].)

Defendant urges us to reexamine our construction of the age factor in *People* v. *Lucky, supra,* 45 Cal.3d 259 and succeeding cases, arguing that the unfettered discretion regarding how the factor is to be considered renders it unconstitutional under the principles of *Gregg* v. *Georgia* (1976) 428 U.S. 153 [49 L.Ed.2d 859, 96 S.Ct. 2909] and *Maynard* v. *Cartwright* (1988) 486 U.S. 356 [100 L.Ed.2d 372, 108 S.Ct. 1853]. We rejected a similar argument in *People* v. *Babbitt* (1988) 45 Cal.3d 660, 716 [248 Cal.Rptr. 69, 755 P.2d 253] and are not persuaded that we should reexamine that reasoning. (See also *People* v. *Edwards* (1991) 54 Cal.3d 787, 844 [1 Cal.Rptr.2d 696, 819 P.2d 436].)

3. *Reference to Suffering by Victims and Their Families.*

Defendant contends that the prosecutor violated *Booth* v. *Maryland* (1987) 482 U.S. 496 [96 L.Ed.2d 440, 107 S.Ct. 2529] and *South Carolina* v. *Gathers* (1989) 490 U.S. 805 [104 L.Ed.2d 876, 109 S.Ct. 2207] by urging the jury to consider characteristics of the victims and the loss suffered by the victims' families. The allegedly objectionable references were made in response to defense counsel's argument that the jury should consider defendant's difficult childhood, including the fact that he had to become the man of the house at the age of eight, as illustrated by a photograph of defendant at his father's funeral.[4]

The prosecutor stated: "I want you to think about this. I want you to look at this picture very hard. When

[4] Defendant's mother testified that defendant was six or seven when his father died. The prosecutor, however, referred to defendant as having been eight at the time of his father's death.

you have got it back there in that room look at it. How hurtful it was at the time or hurtful it is when you see it years later. But remember the Aceves family. Replace all these faces. Put Anthony Aceves in the casket.

"Put Anthony Aceves in that casket. Put his family around it. Because it happened two years ago they are not victims? They are hurt. He should be given compassion? The way he executed that boy?

"Think about the parents and the family of Gilbert Martinez. When they were standing around his casket and they were crying and they were saying 'My God, how could this happen to my child?'

"Marlene Wells. When she was on the ground and the defendant was standing over her and putting two bullets in the back of her head just before she is looking up at him. 'Don't kill me.' Begging for her life. And he shoots her brutally in the back of her head.

"Think about it. They are funerals. Every time you look at this funeral photograph produced by the defense you think of their funerals. You think of their families. And you are called upon to impose death in cases like this when it's so aggravated. How many people must he kill?"

During the pendency of this appeal, both *Booth* v. *Maryland*, *supra*, 482 U.S. 496 and *South Carolina* v. *Gathers*, *supra*, 490 U.S. 805, were largely overruled. In *Payne* v. *Tennessee* (1991) 501 U.S. —— [115 L.Ed.2d 720, 111 S.Ct. 2597], the United States Supreme Court held that the use of victim impact evidence does not offend the Eighth Amendment guaranty of an individualized penalty assessment in a capital trial. We have since held that the injury inflicted by the defendant—including evidence about the victim and the impact of the crime on the victim's family—is one of the circumstances of the crime, evidence of which is admissible under Section 190.3, factor (a). (*People* v. *Edwards*, *supra*, 54 Cal.3d

787, 833-836; *People* v. *Fierro* (1991) 1 Cal.4th 173, 234-235 [3 Cal.Rptr.2d 426, 821 P.2d 1302].)

The prosecutor's remarks qualified for admission under the principles set forth in *Payne* v. *Tennessee*, *supra*, 501 U.S. —— [115 L.Ed.2d 720, 111 S.Ct. 2597] and *People* v. *Edwards*, *supra*, 54 Cal.3d 787. Accordingly, defendant's claim must be rejected.

4. *Biblical References.*

Defendant contends that the prosecutor violated his rights to due process, a fair trial, separation of church and state, and freedom from cruel and unusual punishment by quoting biblical authority in his final argument. We agree that the prosecurtor's argument was improper, but we conclude that it does not require reversal of the penalty judgment.

During final argument, defense counsel stated, inter alia: "It seems almost to be the theater of absurd to be talking about life and death. I don't know what gives me the right to talk about it. . . . [¶] What we have to really talk about is values, purpose. You have to confront yourselves in terms of your own feelings, what you demand from society, what you really demand from Mr. Sandoval, what you demand from yourselves. [¶] Revenge? That's really what we're talking about. When you convicted Mr. Sandoval of these four murders and found the special circumstances to be true, you already guaranteed one thing. Fred Sandoval will die in the penitentiary is one of them in the State of California. Period. He will never come out. He will die in the penitentiary. [¶] The question is is he going to die whatever it is in three years in the gas chamber or is he going to die of old age in the pen or is he going to die because someone stabs him in the back in the penitentiary? But the reality is that he is going to die in the penitentiary. That's already been decided and you decided that.

"And in facing you again and thinking about that and thinking about how hard your job is, how difficult your job is, in reality you could sit, play God to an individual. . . . [¶] In some sense, I really don't know which is worse, execution or the gas chamber or that kind of life in prison. But you have that power alone. Any one of you can stop the execution alone. You have that power. I have never held that awesome power of holding a person's life in my hands. You have that power. You alone. [¶] You also have that responsibility that you are going to carry for the very rest of your life whether you push that button or not. And the bottom line is it's revenge. Because society to you because you are society, you want to extract revenge. Or is it bad enough to stop it and let this man live out his life in prison? . . . [¶] I have come to grasp it now. I looked at you in the eye and you can look back at me. Doesn't change anything. Nothing will bring Anthony Aceves and Gilbert Martinez and the two Wells. Nothing. Won't change. Bottom line is revenge. Just pure and simple. Vengeance.

"If that's what you want, that's what you felt, you push the button. An eye for an eye, a tooth for a tooth, a stripe for a stripe, a life for a life. [¶] I don't think society requires revenge. I don't think that you require revenge. An eye for an eye. [¶] Ghandi said we do this eye for an eye thing, make society require it and do it, what happens is the whole world becomes blind. The light is shut out. That's not right. Don't shut out the light. Don't make the world blind. Don't push that button."

The prosecutor responded to defense counsel's argument by stating: "He told you that it's absurd to talk about life and death, that the law is absurd, that you are playing God, that it's revenge. [¶] And that is to get you, of course, to vote for life without the possibility of parole. Well, death is a legitimate means of punishment in this state. It's available in this state. You are called upon to impose it if you think it's appropriate. You are a cross

section of the community. People are judged by a jury of their peers. You make that determination whether the defendant should get the death penalty or life without the possibility of parole. The defense wants to make that burdensome for you. [']Each and everyone [*sic*] of you from here on must live with that decision. Push that button over there. You must live with that decision for the rest of your life.['] [¶] Well if it wasn't you called upon to carry out the will of the People of the State of California, would have been another jury, because that's our system. That's how the law is affected in this state. [¶] Don't once think that you have to feel burdened and depressed because I voted for death. You are doing what the law says if it's substantial, the aggravation substantially outweighs the mitigation. Don't listen to this lawyer talk. . . ."

"Mr. Appelbaum says don't play God. Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear or authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God an Avenger who brings wrath upon one who practices evil. [¶] You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right. . . . [¶] . . . Let him have the opportunity to get his soul right. That's the only way to get his attention. You are not playing God. God ordains authority."

Defendant asserts that the material in the previous paragraph was a paraphrase of Romans 13:1-7 and that

such reliance on biblical authority to advocate imposition of the death penalty is improper. We agree.

The People seek to justify the argument as having been appropriate rebuttal to defense counsel's argument. While the question is close, we are of the opinion that the prosecutor's argument crossed the line of permissible argument and rebuttal. There are situations in which the prosecutor has been allowed to make comments in rebuttal that would otherwise be improper when such comments are fairly responsive to the argument of defense counsel. (See *People* v. *McDaniel* (1976) 16 Cal.3d 156, 177 [127 Cal.Rptr. 467, 545 P.2d 843]; *People* v. *Hill* (1967) 66 Cal.2d 536, 560 [58 Cal.Rptr. 340, 426 P.2d 908]; see also *United States* v. *Robinson* (1988) 485 U.S. 25, 31-34 [99 L.Ed.2d 23, 30-33, 108 S.Ct. 864].) This however, is not such a situation.

Here, the prosecutor paraphrased a passage of the Bible that is commonly understood as providing justification for the imposition of the death penalty. Such argument is improper. "The closing statements of counsel should relate to the law and the facts of the case as each side interprets them." (*People* v. *Hawthorne, ante*, 43, at p. 60 [—— Cal.Rptr.2d ——, —— P.2d ——].) Though not expressly identified as such, the passage was unmistakably biblical in style and readily recognizable by persons schooled in the Christian religion. The prosecutor "may state matters not in evidence that are common knowledge, or are illustrations drawn from common experience, history, or literature." (*People* v. *Love*, 1961) 56 Cal.2d 720, 730 [16 Cal.Rptr. 777, 366 P.2d 33].) He may not, however, invoke higher or other law as a consideration in the jury's sentencing determination. (*Jones* v. *Kemp* (N.D.Ga. 1989) 706 F.Supp. 1534, 1559; *Commonwealth* v. *Chambers* (1991) 528 Pa. 558 [599 A.2d 630, 644].) The argument here was clearly improper by exhorting the jury to consider factors outside section 190.3 in making its penalty determination.

Penalty determinations are to be based on the evidence presented by the parties and the legal instructions given by the court. Reference by either party to religious doctrine, commandments or biblical passages tending to undermine that principle is improper. We recognize that the defense must be allowed some latitude in its presentation of mitigating evidence. Nevertheless, we do not understand that latitude to include exhortation of religious canons as a factor weighing against the death penalty. If the defense were to present such argument, it would be subject to objection by the prosecution and possible like-kind argument in rebuttal. (See *United States* v. *Robinson, supra*, 485 U.S. at pp. 31-34 [99 L.Ed.2d at pp. 30-33].) What is objectionable is reliance on religious authority as supporting or opposing the death penalty. The penalty determination is to be made by reliance on the legal instructions given by the court, but by recourse to extraneous authority. (*Jones* v. *Kemp, supra*, 706 F.Supp. 1534, 1559.) We do not mean to rule out all reference to religion or religious figures so long as the reference does not purport to be a religious law or commandment.

Though we have found that the argument in this case constituted misconduct, we do not find that it requires reversal of the penalty judgment. The jurors deliberated for four days before indicating that they were split six to six on two counts and five to seven on the other two. After further deliberations the next day, they returned verdicts of life without possibility of parole on three of the counts and death on only one of the counts. Under these circumstances, we find no reasonable possibility that the jury would have reached more favorable verdicts had the misconduct not occurred. (See *People* v. *Brown, supra*, 46 Cal.3d 432, 448-449.) The result is the same under the federal *Chapman* test (*Chapman* v. *California* (1968) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065]).

5. *Jury Deadlock.*

Defendant contends that the trial court coerced the jury's verdict by requiring it to continue deliberating after the jury had declared a deadlock.

The jury retired for its penalty deliberations at 1:10 p.m. on Thursday, March 12, 1987, and deliberated until 2:45 p.m. Deliberations continued at 8:05 a.m. on Friday morning until the court recessed the jury at 11:45 a.m. to allow counsel time to submit argument on the appropriate response to a question submitted by the jury. The jury had been given separate verdict forms for each victim and it asked whether it could find that different penalties are applicable to different counts. On Monday morning, March 16, 1987, the court responded to the jury's question by stating, "you should reach a verdict as to each count if you can." At 8:50 a.m. the jury resumed deliberations and continued until court was adjourned at 1:30 p.m. Deliberations continued on Tuesday, March 17, for an hour and a half. After deliberating two and a half more hours the next morning, March 18, the jury sent the court a note stating, "We cannot reach a verdict. How do you proceed from this point on, and what would you like us to do?" The court called the jury out and asked the foreman whether there was "any reasonable possibility, and I emphasize the word 'possible' that the jury can arrive at a verdict as to any count given further deliberations, the rereading of any testimony or the answering of any question that I can answer?" The foreman answered, "No. We have discussed that possibility, and we don't believe that we can reach a verdict." The court then asked for the jury division on each count and was told that it was six to six on count 1, six to six on count 2, five to seven on count 3, and five to seven on count 4. The court then polled each juror as to "whether you think there is a reasonable possibility with further deliberations you can arrive at a verdict as to any of the counts," and each juror replied, "No."

In a conference outside the jury's presence, the court indicated that it wanted the jury to spend a little more time and that it would probably declare a mistrial if the jury did not reach a verdict the next day. The court estimated that the jury had deliberated for about three full days and noted that a little more time would not be unreasonable in light of the fact that the trial had lasted five months. The court released the jury for that day with directions to return at 7:45 a.m. the next morning. After further deliberations the next morning, Thursday, March 19, 1987, the jury returned its verdicts of life without possibility of parole as to counts 1, 2 and 3, and a verdict of death as to count 4.

Section 1140 provides: "Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

"The determination whether there is reasonable probability of agreement rests in the discretion of the trial court. (*People* v. *Miller* (1990) 50 Cal.3d 954, 993 [269 Cal.Rptr. 492, 790 P.2d 1289]; *People* v. *Sheldon* (1989) 48 Cal.3d 935, 959 [258 Cal.Rptr. 242, 771 P.2d 1330]; *People* v. *Rodriguez* (1986) 42 Cal.3d 730, 775 [230 Cal.Rptr. 667, 726 P.2d 113]; *People* v. *Rojas* (1975) 15 Cal.3d 540, 546 [125 Cal.Rptr. 357, 542 P.2d 229, 92 A.L.R.3d 1127]; *People* v. *Carter* (1968) 68 Cal.2d 810, 817 [69 Cal.Rptr. 297, 442 P.2d 353].) The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.' (*People* v. *Carter, supra*, 68 Cal.2d at p. 817.)" (*People* v. *Breaux* (1991) 1 Cal.4th 281, 319 [3 Cal.Rptr.2d 81, 821 P.2d 585].) The question of

coercion is necessarily dependent on the facts and circumstances of each case. (*Ibid.*)

Defendant argues that the length of time the jury had been deliberating demonstrates that the jury had given careful consideration to the evidence and that a mistrial would have been warranted. (Compare *People* v. *Rich, supra,* 45 Cal.3d 1036, 1117 [court declined to declare mistrial on penalty after jury declared itself unable to reach verdict following only one hour of deliberation].) Defendant also cites the virtually even split and the jurors' individual statements against the usefulness of further deliberations as indicating that the court should have declared a mistrial. None of these factors, however, removed the court's discretion to require further deliberations. The jury had deliberated a similar amount of time in *People* v. *Breaux, supra,* 1 Cal.4th 281, 317-320, when it was asked to continue even though all of the jurors were negative on the prospects of a verdict. In *People* v. *Rodriguez, supra,* 42 Cal.3d 730, 774-777, we found no abuse of discretion in requiring the jury to continue deliberating after it declared itself unable to reach a verdict following 18 days of deliberation.

As further evidence of his claim that the verdict was coerced, defendant points to the facts that the order to continue deliberations was unaccompanied by further explanation and that the verdicts were reached shortly thereafter. The form of the verdicts—three for life and one for death—is also cited as evidence of "considerations of compromise and expediency" (*People* v. *Carter, supra,* 68 Cal.2d at p. 817) rather than independent judgment. We are not persuaded. Other explanations for the difference in the verdicts are readily apparent. The jury may have felt that only one death verdict was necessary and that the killing of Marlene Wells was most egregious since she had no involvement with defendant. Thus the difference in the verdicts may be explained by the difference in the circumstances of the crimes. Defendant's assertion

that the verdicts should have been uniform is based on the incorrect premise that the aggravating and mitigating circumstances were the same as to each count. They were not. Each murder had its own set of circumstances, which qualified for consideration under factor (a) of section 190.3.

Nothing in the record suggests that the jury was coerced in any way. The court made no statements that could be interpreted as exerting pressure on any juror. The court viewed the jury as a responsible group that took its duty seriously. The court was not unreasonable in concluding that, in light of the fact that the trial itself had taken some five months, the jury should put in a little more time than the fourteen and one-quarter hours it had deliberated up to that point. The record shows no abuse of discretion.

6. *Separate Verdict Forms.*

Defendant contends that the trial court erred in requiring the jury to return a separate penalty verdict as to each murder victim. Defendant argues that the multiple verdicts obscured the overriding constitutional value of reaching a comprehensive determination of the appropriateness of the death penalty considering all aggravating and mitigating circumstances and invited compromise verdicts. He also claims that the multiple penalty verdicts placed undue emphasis on the characteristics and status of individual victims, relying on *Booth* v. *Maryland, supra,* 482 U.S. 496 and *South Carolina* v. *Gathers, supra,* 490 U.S. 805. We are not convinced.

A defendant who kills more than one person may be convicted and punished for each murder. (*People* v. *Andrews* (1989) 49 Cal.3d 200, 225 [260 Cal.Rptr. 583, 776 P.2d 285]; *People* v. *Ramos* (1982) 30 Cal.3d 553, 587 [180 Cal.Rptr. 266, 639 P.2d 908].) Separate penalty verdicts have been returned in other capital cases. The defendant in *People* v. *Bittaker* (1989) 48 Cal.3d 1046 [259 Cal.Rptr. 630, 774 P.2d 659] was convicted

of first degree murder of five victims and was given separate death verdicts as to each murder victim. (*Id.* at pp. 1106, 1110, fn. 34.) Likewise, the defendant in *People* v. *Mattson* (1990) 50 Cal.3d 826 [268 Cal.Rptr. 802, 789 P.2d 983], who was convicted of the first degree murder of two girls, was given a separate verdict of death as to each murder victim. (*Id.* at p. 838). We are not persuaded that there is any impropriety in requiring the jury to return a separate penalty verdict for each capital murder count.

7. *Standard for Imposition of Death.*

The court gave CALJIC No. 8.84.2 (1986 rev.) on the standards for determining the penalty verdicts. Defendant objects to the following language in that instruction: "To return a judgment of death, each of you must be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors that it warrants death instead of life in prison without parole." Defendant complains that the instruction did not inform the jury that a necessary condition for imposition of the death penalty is a finding that aggravation outweighs mitigation rather than merely being "so substantial in comparison."

We rejected a similar challenge to this language in *People v. Breaux, supra,* 1 Cal.4th at pages 315-316. There, as in this case, the language in question was preceded by instructions that provide: "The weighing of aggravating and mitigating factors does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various . . . factors you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of aggravating factors with the

totality of the mitigating factors." The instructions given, in our view, were sufficient to inform the jury that it could return a death verdict only if the aggravating circumstances outweighed the mitigating circumstances.

8. *Cumulative Error.*

Defendant contends that the cumulative effect of errors during the penalty phase trial requires reversal of the penalty. Since we have found only one error in the penalty phase, there is no cumulative effect.

Conclusion

The judgment is affirmed.

Lucas, C. J., Kennard, J., Arabian, J., Baxter, J., and George, J., concurred.

MOSK, J., Concurring and Dissenting.—I concur in the judgment as to guilt, death eligibility, and noncapital sentence. After review, no error or other defect is evident requiring reversal or vacation on any of these issues.

I dissent, however, from the judgment as to the sentence of death. As will appear, there was prejudicial prosecutorial misconduct bearing on this question.

I

In summation at the penalty phase, defense counsel urged the jury to fix the penalty for defendant at life imprisonment without possibility of parole.

By contrast, the prosecutor asked for death. In the course of his argument, he made the following comments.

"I want to respond to some of the things argued by [defense counsel]. He told you that it's absurd to talk about life and death, that the law is absurd, that you are playing God, that it's revenge.

"And that is to get you, of course, to vote for life without the possibility of parole. Well, death is a legitimate means of punishment in this state. It's available in this state. You are called upon to impose it if you think it's appropriate. You are a cross section of the community. People are judged by a jury of their peers. You make that determination whether the defendant should get the death penalty or life without the possibility of parole. The defense wants to make that burdensome for you. ['Each and everyone [*sic*] of you from here on must live with that decision. Push that button over there. You must live with that decision for the rest of your life.']

"Well, if it wasn't you called upon to carry out the will of the people of the State of California, would have been another jury, because that's our system. That's how the law is affected in this state.

"Don't once think that you have to feel burdened and depressed because I voted for death. You are doing what the law says if it's substantial, the aggravation substantially outweighs the mitigation. Don't listen to this lawyer talk.

". . . .

"[Defense counsel] says don't play God. ['Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sworn for nothing for it is a minister of God an avenger who brings wrath upon one who practices evil.']

"You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right. . . .

". . . .

". . . Let him have the opportunity to get his soul right. That's the only way to get his attention. You are not playing God. God ordains authority."

At this point, defense counsel objected and asked to approach the bench, but met with summary denial.

II

"It is of course misconduct for a prosecutor to invoke purported religious law in support of the imposition of the penalty of death." (*People* v. *Hill* (1992) 3 Cal.4th 959, 1016 [— Cal.Rptr.2d —, — P.2d —] (conc. opn. of Mosk, J.); accord, *People* v. *Wrest* (1992) 3 Cal.4th 1088, 1107 [— Cal.Rptr.2d —, — P.2d —].)

"Argument of this sort by a representative of the government offends California statutes and judicial decisions, which establish the positive, secular law of this state as the rule governing the choice between life and death (see *People* v. *Mincey* (1992) 2 Cal.4th 408, 483-484 [6 Cal.Rptr.2d 822, 827 P.2d 388] (conc. & dis. opn. of Mosk, J.)). It also violates the United States and California Constitutions—including their respective clauses concerning establishment of religion (U.S. Const., Amend. I; Cal. Const., art. I, § 4), cruel and unusual punishments (U.S. Const., Amend. VIII; Cal. Const., art. I, § 17), and due process of law (U.S. Const., Amend. XIV; Cal. Const., art. I, § 15)." (*People* v. *Hill, supra,* 3 Cal.4th at pp. 1016-1017 (conc. opn. of Mosk, J.); see also *People* v. *Wrest, supra,* 3 Cal.4th at p. 1107 [holding that "such an argument tends to diminish the jury's sense of responsibility for its verdict and to imply that another, higher

law should be applied in capital cases, displacing the law in the court's instructions"].)

"It is well settled that religion may not play a role in the sentencing process." (*Jones* v. *Kemp* (N.D.Ga. 1989) 706 F.Supp. 1534, 1559; accord, *People* v. *Mincey* (1992) 2 Cal.4th 408, 485 [6 Cal.Rptr.2d 822, 827 P.2d 388] (conc. & dis. opn. of Mosk, J.); see *People* v. *Wrest, supra,* 3 Cal.4th at p. 1107.)

The jury has "a duty to apply the law of the [jurisdiction] as given by the trial judge, not its own interpretation of the law or its own interpretation of precepts of the Bible, in determining whether the [defendant] should live or die." (*Jones* v. *Kemp, supra,* 706 F.Supp. at p. 1559; accord, *People* v. *Mincey, supra,* 2 Cal.4th at p. 485 (conc. & dis. opn. of Mosk, J.); see *People* v. *Wrest, supra,* 3 Cal.4th at p. 1107.)

The invocation of "the command of extrajudicial 'law' from any source other than the trial judge, no matter how well intentioned, is not permitted." (*Jones* v. *Kemp, supra,* 706 F.Supp. at p. 1559; accord, *People* v. *Mincey, supra,* 2 Cal.4th at p. 485 (conc. & dis. opn. of Mosk, J.); see *People* v. *Wrest, supra,* 3 Cal.4th at p. 1107.)

Indeed, the "use . . . of an extrajudicial code . . . cannot be reconciled within the Eighth Amendment's requirement that any decision to impose death must be the result of discretion which is carefully and narrowly channelled and circumscribed by the secular law of the jurisdiction." (*Jones* v. *Kemp, supra,* 706 F.Supp. at p. 1559; accord, *People* v. *Mincey, supra,* 2 Cal.4th at p. 485 (conc. & dis. opn. of Mosk, J.); see *People* v. *Wrest, supra,* 3 Cal.4th at p. 1107.)

The Bible, of course, is just such an extrajudicial code. (*People* v. *Mincey, supra,* 2 Cal.4th at p. 483 (conc. & dis. opn. of Mosk, J.); *Jones* v. *Kemp, supra,* 706 F.Supp. at p. 1559.) Its commands and prohibitions cannot be

viewed as mere reliquiae of a culture separated from ours by thousands of miles and thousands of years. This is because "[t]o the average juror, . . . the Bible is an authoritative religious document . . . ." (*Jones* v. *Kemp, supra,* at p. 1599; accord, *People* v. *Mincey, supra,* at pp. 483-484 (conc. & dis. opn. of Mosk, J.).)

It is also misconduct for a prosecutor to seek to "minimize the jury's sense of responsibility for determining the appropriateness of death." (*Caldwell* v. *Mississippi* (1985) 472 U.S. 320, 341 [86 L.Ed.2d 231, 247, 105 S.Ct. 2633]; accord, *People* v. *Wrest, supra,* 3 Cal.4th at p. 1107.) "[U]nder the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'" (*Caldwell* v. *Mississippi, supra,* at p. 329 [86 L.Ed.2d at p. 239], quoting *California* v. *Ramos* (1983) 463 U.S. 992, 998-999 [77 L.Ed.2d 1171, 1178-1179, 103 S.Ct. 3446].) The assumption underlying Eighth Amendment jurisprudence is that "a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'" (*Caldwell* v. *Mississippi, supra,* at p. 341 [86 L.Ed.2d at p. 247].) This premise is threatened when a representative of the government attempts to undermine the jurors' proper attitude and approach.

It hardly needs mention that "[a] prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the State." (*People* v. *Espinoza* (1992) 3 Cal.4th 806, 820 [12 Cal.Rptr.2d 682, 838 P.2d 204].)[1]

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[1] Because the issue is not raised in this case, I do not attempt to define "religious" misconduct *by defense counsel.* Certainly, the task would require some delicacy. For example, the provisions of the United States and California Constitutions that constrain the prosecution in this regard—including the clauses concerning establishment of religion (U.S. Const., Amend. I; Cal. Const., art. I,

III

On the very face of the record, prosecutorial misconduct is manifest.

To begin with, the prosecutor invoked purported religious law in support of the imposition of the penalty of death. That is indisputable.

As noted, the prosecutor stated: "[Defense counsel] says don't play God. ['] Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God an avenger who brings wrath upon one who practices evil.['] [¶] You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right." The prosecutor returned to the point: "Let him have the opportunity to get his soul right. That's the only way to get his attention. You are not playing God. God ordains authority."

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§ 4), cruel and unusual punishments (U.S. Const., Amend. VIII; Cal. Const., art. I, § 17), and due process of law (U.S. Const., Amend. XIV; Cal. Const., art. I, § 15)—are generally inapplicable to the defense. (But see Cal. Const., art. I, § 29 ["In a criminal case, the people of the State of California have the right to due process of law . . . ."].) I leave this labor to another day. The majority should do so as well. They purport to distinguish between permissible references to "religion" and impermissible references to "religious law." Their "rule" may be suitable for sophists to debate in rhetorical exercises. It is altogether too vague for the bench and bar to apply in criminal trials.

In a word, the "rule of decision" that the prosecutor urged the jury to apply was assertedly religious. He cited the Bible to the jurors. To be sure, he did not expressly identify the relevant passage—which is Romans 13:1-4—as biblical in source and in substance. No such identification was required. There is no reasonable likelihood that the jury understood the words to be anything other than what they were.

Further, the "purpose of punishment" that the prosecutor called on the jury to serve was assertedly religious as well. He exhorted the jurors to destroy defendant's corruptible body in order to save his immortal soul.[2]

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[2] In accord with above analysis in *Commonwealth* v. *Chambers* (1991) 528 Pa. 558 [599 A.2d 630]. There, the Pennsylvania Supreme Court considered a claim of prosecutorial misconduct based on comments that "Karl Chambers has taken a life" and "As the Bible says, 'and the murderer shall be put to death.'" It found the point meritorious. Its reasoning was as follows.

"In the past we have narrowly tolerated references to the Bible and have characterized such references as on the limits of 'oratorical flair' and have cautioned that such references are a dangerous practice which we strongly discourage. *Commonwealth* v. *Henry*, 524 Pa. 135, 569 A.2d 929 (1990); *Commonweath* v. *Whitney*, 511 Pa. 232, 512 A.2d 1152 (1986). We now admonish all prosecutors that reliance in any manner upon the Bible or any other religious writing in support of the imposition of a penalty of death is reversible error per se and may subject violators to disciplinary action.

"Here, the prosecutor argued, 'As the Bible says, "and the murderer shall be put to death."' This reference is substantially different than the references tolerated in *Henry* and *Whitney* where the prosecutor allegorically likened the Defendant to the Prince of Darkness mentioned in the Bible to establish that he was an evil person.

"More than allegorical reference, this argument by the prosecutor advocates to the jury that an independent source of law exists for the conclusion that the death penalty is the appropriate punishment for [Chambers]. By arguing that the Bible dogmatically commands that 'the murderer shall be put to death,' the prosecutor interjected religious law as an additional factor for the jury's consideration which neither flows from the evidence or any legitimate inference

The majority rightly conclude that the prosecutor's impropriety cannot be justified or even excused as "fairly responsive" to comments in defense counsel's summation. True, the prosecutor asserted that he "want[ed] to respond to some of the things argued by [defense counsel]." But there was nothing "fairly responsive" about what he would soon say. Perhaps the matter would have been different if counsel had declared or even suggested that the death penalty was inappropriate under some religious law. He had not done so. Notwithstanding his utterance of the word "God" and his reference to *lex talionis*, his argument was altogether secular—to the effect that the jurors each held an absolute power of life and death over defendant; that they should reject death as empty vengeance; and that they should choose life to vindicate what is good in human beings and human society.

More important, even a "fair response" of this kind by a prosecutor would be altogether impermissible. It is plain from the analysis set out above that the government is prohibited from interjecting religion into the sentencing process. The prosecutor is its representative. The bar that constrains the principal constrains the agent as well.

In addition, the prosecutor sought to minimize the jury's sense of responsibility for determining the appropriateness of death. That too is indisputable.

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to be drawn therefrom. We believe that such an argument is a deliberate attempt to destroy the objectivity and impartiality of the jury which cannot be cured and which we will not countenance. Our courts are not ecclesiastical courts and, therefore, there is no reason to refer to religious rules or commandments to support the imposition of a death penalty.

"Our Legislature has enacted a Death Penalty Statute which carefully categorizes all the factors that a jury should consider in determining whether the death penalty is an appropriate punishment and, if a penalty of death is meted out by a jury, it must be because the jury was satisfied that the substantive law of the Commonwealth requires its imposition, not because of some other source of law." (*Commonwealth* v. *Chambers*, *supra*, 528 Pa. at pp. 586-587 [599 A.2d at p. 644].)

As noted, the prosecutor stated: "The defense wants to make [the penalty determination] burdensome for you ['] Every and everyone [*sic*] of you from here on must live with that decision. Push that button over there. You must live with that decision for the rest of your life.['] [¶] Well, if it wasn't you called upon to carry out the will of the people of the State of California, would have been another jury, because that's our system. That's how the law is affected in this state. [¶] Don't once think that you have to feel burdened and depressed because I voted for death. You are doing what the law says if it's substantial, the aggravation substantially outweighs the mitigation. Don't listen to this lawyer talk."

The prosecutor's impropriety in this regard cannot seriously be denied. Indeed, the majority's efforts here are totally nonexistent—and that in spite of the fact that defendant expressly raised the claim in his briefing before this court.

I now turn from the fact of the prosecutor's misconduct to its consequence.

It is the general rule for error under California law that reversal requires prejudice (*People* v. *Gordon* (1990) 50 Cal.3d 1223, 1253 [270 Cal.Rptr. 451, 792 P.2d 251]) and prejudice in turn requires a reasonable possibility of an effect on the outcome when, as here, penalty in a capital trial is involved (*People* v. *Brown* (1988) 46 Cal.3d 432, 446-448 [250 Cal.Rptr. 604, 758 P.2d 1135]).

Similarly, it is the general rule for error under the United States Constitution that reversal requires prejudice and prejudice in turn is presumed unless the government shows that the failing was harmless beyond a reasonable doubt. (See, e.g., *Rose* v. *Clark* (1986) 478 U.S. 570, 576-579 [92 L.Ed.2d 460, 469-471, 106 S.Ct. 3101].)

The prosecutor's misconduct implicates both California law and the United States Constitution. It appears to be subject to the general rule of harmless-error analysis. Thus, insofar as state law is concerned, the "reasonable possibility" standard is applied. Insofar as the federal charter is involved, the "reasonable doubt" test is employed.

The prosecutor's misconduct went to the first, last, and only issue before the jury in the penalty phase of this capital trial, viz., whether they were to take or spare defendant's life. The evidence in aggravation was not insubstantial. But not insubstantial too was the evidence in mitigation.

The prosecutor's attempt to minimize the jury's responsibility cannot be deemed unsuccessful. "A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion." (*Caldwell* v. *Mississippi, supra,* 472 U.S. at p. 333 [86 L.Ed.2d at p. 242].) Comments like those of the prosecutor in this case offered the jurors an easy way to avoid a hard choice—in fact, an especially hard choice, to judge from the relatively close balance of aggravation and mitigation at the penalty phase and the labored progress of the deliberations thereafter.

Perhaps more significant, the prosecutor's argument from purported religious law must have carried special force, incorporating as it did "what many consider an authoritative source—if not Authority Itself." (*People* v. *Mincey, supra,* 2 Cal.4th at p. 487 (conc. & dis. opn. of Mosk, J.).)

I acknowledge that the jury did not return its verdict of death immediately after the prosecutor's misconduct and that it also returned three verdicts of life. "That fact means only that [the] impropriety did not instantly [and totally] determine the outcome. It simply does not suggest that it was without improper influence." (*People* v. *Mincey, supra,* 2 Cal.4th at p. 487 (conc. & dis. opn. of Mosk. J.).) The majority appear to assume that the force of the impropriety was dissipated in the course of deliberations. A contrary assumption, however, seems more reasonable on this record: the impropriety's force actually determined the course of deliberations and thereby prevented four early verdicts of life.[a]

In sum, the misconduct raises a reasonable possibility of an adverse effect on the outcome, and cannot be deemed harmless beyond a reasonable doubt.

IV

For the reasons stated above, I would set aside the sentence of death.

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[a] In accord on this point as well is *Commonwealth* v. *Chambers, supra,* 528 Pa. 558 [599 A.2d 630]. As noted, the Pennsylvania Supreme Court in that case held meritorious a claim of prosecutorial misconduct based on the comments that "Karl Chambers has taken a life" and "As the Bible says, 'and the murderer shall be put to death.'" (See fn. 2, *ante.*) "Because the prosecutor's argument in favor of the death penalty reached outside of the evidence of the case and the law of this Commonwealth," concluded the court, "we are not convinced that the penalty was not the product of passion, prejudice or an arbitrary factor and, therefore, pursuant to our Death Penalty Statute, we must vacate the sentence of death . . . ." (528 Pa. at p. 587 [599 A.2d at p. 644].)

No. CR26405
S004765

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

THE PEOPLE,
Respondent

v.

ALFRED ARTHUR SANDOVAL,
Appellant

Petition for rehearing DENIED.

Mosk, J. is of the opinion the petition should be granted.

Opinion modified.

/s/ [Illegible]
Chief Justice

SUPREME COURT OF THE UNITED STATES

No. 92-9049

ALFRED ARTHUR SANDOVAL,
Petitioner

v.

CALIFORNIA

ORDER ALLOWING CERTIORARI

Filed September 28, 1993

The petition herein for a writ of certiorari to the Supreme Court of California is granted limited to Question 1 presented by the petition. The case is consolidated with No. 92-8894, *Victor v. Nebraska*, and a total of ninety minutes is allotted for oral argument. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 9, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 7, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 21, 1993. Rule 29 does not apply.

September 28, 1993

(6)

Supreme Court, U.S.
FILED
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No. 92-9049

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ALFRED ARTHUR SANDOVAL,
Petitioner

v.

CALIFORNIA,
Respondent.

On Writ of Certiorari to the Supreme Court of California

PETITIONER'S BRIEF ON THE MERITS

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98 pp

QUESTION PRESENTED

Was petitioner deprived of due process and a fair jury trial by the use of constitutionally defective reasonable doubt instructions which invited the jury to base its verdict on improper "moral" considerations rather than on an evidentiary evaluation? *Cage v. Louisiana*, 498 U.S. 39 (1990); *Sullivan v. Louisiana*, —— U.S. ——, 124 L.Ed.2d 182 (1993).

TOPICAL INDEX

	Page
QUESTION PRESENTED	i
JURISDICTIONAL STATEMENT	1
APPLICABLE CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. THE CORE CONCEPT OF PROOF BEYOND A REASONABLE DOUBT AND A SURVEY OF CONSTITUTIONALLY ADEQUATE EXPLANATIONS	6
A. The Core Concept of Proof Beyond a Reasonable Doubt	6
B. Constitutionally Adequate Explanations of the Concept of Proof Beyond a Reasonable Doubt	9
II. RECOGNIZED DEFECTS IN INSTRUCTIONS ON THE STANDARD OF PROOF BEYOND A REASONABLE DOUBT	14
III. THE CONSTITUTIONAL DEFECTS IN THE REASONABLE DOUBT INSTRUCTION GIVEN IN THIS CASE	15
A. The Instruction Understated the Constitutionally Required Degree of Certainty	17
B. The Instruction Overstated the Degree of Doubt Necessary to Acquit	21
C. The Instruction Invited the Jury to Supplant the Objective Evaluation of the Prosecution's Evidence With Improper Reliance on Moral Considerations and Personal Predilections	24

TOPICAL INDEX—Continued

	Page
1. The "moral certainty" problem	24
2. The "moral evidence" problem	30
IV. PETITIONER WAS DEPRIVED OF DUE PROCESS BY THE DEFECTIVE REASONABLE DOUBT INSTRUCTIONS	32
A. The Test for Determining Whether Jury Instructions Violate Constitutional Rights	32
B. Application of the Test to This Case	34
1. The likelihood of misapplication as indicated by textual analysis	34
a. The manifest defects in the instruction	34
b. The absence of countervailing or corrective language	35
2. The likelihood of misapplications indicated by the record as a whole	37
V. THE WANING OF THE MORAL CERTAINTY LANGUAGE IN AMERICAN JURISPRUDENCE	41
CONCLUSION	42
APPENDIX A:	
SURVEY OF CURRENT USAGE OF MORAL CERTAINTY LANGUAGE IN REASONABLE DOUBT INSTRUCTIONS	A-1
APPENDIX B:	
CURRENTLY APPROVED REASONABLE DOUBT INSTRUCTIONS	B-1

TABLE OF AUTHORITIES CITED

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TABLE OF AUTHORITIES CITED—Continued

	Page
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State	
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State v. Williams, 828 P.2d 1006 (1992)	24, 31
Constitutional Provisions	
United States Constitution, Amendment V	1, 40
United States Constitution, Amendment VI	2, 40
Statutes	
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	Page
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-9049

ALFRED ARTHUR SANDOVAL,
Petitioner

v.

CALIFORNIA,
Respondent.

On Writ of Certiorari to the Supreme Court of California

PETITIONER'S BRIEF ON THE MERITS

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Calfornia was entered on December 14, 1992, affirming petitioner's convictions of murder and attempted murder, and the sentence of death. *People v. Sandoval*, 4 Cal.4th 155 (1992). Joint Appendix 95, hereinafter "J.A." The Supreme Court denied a timely petition for rehearing on February 10, 1993. J.A. 150. On June 10, 1993, petitioner filed a petition for writ of certiorari, which this Court granted on September 28, 1993. J.A. 151. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

APPLICABLE CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty or property without due process of law.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

California Penal Code, section 1096:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: "It is not a mere possible doubt; because everything related to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge."

California Penal Code, section 1096a:

> In charging a jury, the court may read to the jury section 1096 of this code, and no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given.

California Jury Instructions—Criminal, no. 2.90 (5th ed., West Publishing Co. 1988):

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

Additional statutes and jury instructions from other states are set out in the appendices.

STATEMENT OF THE CASE

Petitioner Alfred Sandoval was charged in Los Angeles Superior Court on July 8, 1985 with two counts of murder and one count of attempted murder occurring on October 13, 1984, and two additional counts of murder occurring on October 31, 1984. J.A. 1. The prosecution sought the death penalty.

A jury was sworn to try the case on November 25, 1986, and the prosecution rested on December 22. The defense concluded its case on January 20, 1987, and, after argument, the jury was instructed on February 10, 1987, and began its deliberations regarding the following evidence. J.A. 97-102.

The October 13, 1984 shootings occurred in Belvedere Park in East Los Angeles, a predominantly Hispanic area with a history of violent gang warfare. Petitioner acknowledged that he shot three other Hispanic males at the park. The two decedents were shown by post-mortem blood analysis to be heavily intoxicated with PCP. Petitioner contended that the shootings occurred in self-defense, when the three victims, all affiliated with a local street gang, attacked petitioner and a cohort.

The October 31, 1984 counts related to the shooting of Ray and Marlene Wells in their home. Ray Wells was a local crime figure involved in drug dealing, stolen property, and other illegal activities. There were no eyewitness identifications of any perpetrator of the shooting, nor any physical evidence demonstrating petitioner's presence at the Wells home at the time of the offense.

The prosecution's principal inculpatory evidence consisted of bargained-for informer testimony regarding purported post-offense admissions by petitioner. Petitioner vigorously attacked the credibility of the prosecution's bargained-for witness and presented an affirmative alibi defense to these charges.

The jury began deliberations on February 10. J.A. 1. The jury returned guilty verdicts on the October 13, 1984 Belvedere Park counts on February 12, Clerk's Transcript, pp. 1495-1496; hereinafter "CT." However, the jury deliberated for another 11 days before returning guilty verdicts as to the Wells counts on February 23. J.A. 1.

Penalty trial began on March 2, 1987, the parties rested on March 12, and the jury deliberated from March 12 through March 18, at which time the jury declared an even split deadlock. J.A. 1. The court nonetheless directed deliberations to continue, after which the jury returned verdicts on March 19 of life without parole on counts I to III (relating to victims Aceves, Martinez, and Ray Wells) and a verdict of death on count IV (relating to victim Marlene Wells). J.A. 1.

The reasonable doubt instruction, given both at guilt phase to govern the jury's deliberations as to all counts, and at penalty phase with respect to the evidence of other criminal activity presented in aggravation by the prosecution, was as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that

> state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. Reporter's Transcript, p. 5208; hereinafter "RT"; J.A. 49.

It is that instruction which petitioner challenges as diluting the prosecutor's burden of proof beneath constitutional standards and depriving him of due process and a fair jury trial.

SUMMARY OF ARGUMENT

The reasonable doubt instruction given in this case consists of a passage cloned from *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295 (1850). The crucial phrases "moral evidence" and "moral certainty" had very specific and clear meanings from the 17th century through the mid-19th century, consistent with the then-existing *and* with today's understanding of proof beyond a reasonable doubt. "Moral evidence" meant evidence from human sources as distinguished from mathematical evidence such as geometric proofs. "Moral certainty" meant the highest degree of certainty attainable regarding human affairs, as opposed to the absolute certainty of mathematics or logic.

However, the meanings of those key phrases have changed dramatically during the past 150 years, and have for some time been *in*consistent with contemporary constitutional conceptions of proof beyond a reasonable doubt. "Moral evidence" now connotes *non*-factual or *non*-evidentiary support for a proposition, and "moral certainty" has evolved into two additional meanings, one denoting a *lower* degree of certitude than proof beyond a reasonable doubt requires; and the second denoting an individual belief *not* necessarily based on evidence or facts, but on personal values or convictions. All federal circuits and the overwhelming majority of states have discarded the "moral certainty/moral evidence" language from their reasonable doubt jury instructions. Only Cali-

fornia, Idaho, Tennessee, North Dakota, and Massachusetts (whose Supreme Court launched the "moral certainty/moral evidence" verbiage in 1850) retain jury instructions which include that archaic and now affirmatively misleading language.

The instruction given in this case is not merely a jurisprudential dinosaur, easily recognized as an outdated irrelevancy and likely to be ignored by ordinary jurors. To the contrary, the phrases "moral evidence" and "moral certainty" have evolved contemporary meanings that, coupled with other defects in the instruction, are more than reasonably likely to frame jury deliberations in a way that undermines the constitutional standard of proof beyond a reasonable doubt.

ARGUMENT

I. THE CORE CONCEPT OF PROOF BEYOND A REASONABLE DOUBT AND A SURVEY OF CONSTITUTIONALLY ADEQUATE EXPLANATIONS.

A. The Core Concept of Proof Beyond a Reasonable Doubt.

In 1970, this Court explicitly stated that the standard of proof beyond a reasonable doubt was an indispensable component of due process guarantees in all criminal proceedings. *In re Winship*, 397 U.S. 358, 364 (1970). That standard had been incorporated into American criminal jurisprudence during the course of the 19th century.[1] By the turn of the century, it was ubiquitous among state and federal jurisdictions. Although there has been considerable variation among descriptive and explanatory formulations in appellate courts and jury instructions, the core concept is straightforward. Proof beyond a reasonable doubt is proof which impels the trier of fact to "a subjective state of certitude of the facts in issue," so that the trier of fact is convinced of the de-

[1] Morano, "A Reexamination of the Development of the Reasonable Doubt Rule" (55 B.U.L. Rev. 507 (1975)).

fendant's guilt "with utmost certainty." *Winship*, 397 U.S. at 364. This Court has explained that to convict, jurors must reach "a state of near certitude," *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). The "utmost certainly" referred to in *Winship* refers to the highest level of certainty attainable in the domain of human affairs, involving factual questions depending on *empirical* evidence, i.e., the level of certainty a notch shy of the absolute certainty available only in the domains of physics or mathematics.

This distinction between absolute certainty (*not* required in the legal system), and proof beyond a reasonable doubt (the penultimate degree of certainty which *is* required in criminal proceedings) has its origins in works of 17th century English philosophers, spearheaded by John Locke, who posited three types of knowledge: 1) that established by logical and deductive demonstrations, such as proofs in geometry, potentially yielding absolute certainty; 2) that based on testimony and second-hand reports of events, potentially yielding near but never absolute certainty; and 3) that based on immediate sensory experience of a phenomenon.[2] The second category, empirical knowledge based on reports of events in the real world, was obviously the type of knowledge used to make decisions in areas such as law, history, and certain areas of natural science, and was described in the phraseology of the 17th century as "moral evidence or moral knowledge," which had the possibility of leading to "moral certainty."[3]

[2] Shapiro, *"To a Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 Hastings L.J. 153 (1986). The Shapiro and Morano articles each provide an extensive review of the historical development of the legal standard of proof beyond a reasonable doubt and its philosophical underpinnings in the works of Locke, Wilkins, et al. See also Waldman, *Origins of Legal Doctrine of Reasonable Doubt*, 20 J. History of Ideas 299 (1959).

[3] The phrase, "moral certainty," was used in the writings of the English philosophers to designate the maximum degree of

Locke's contemporary, John Wilkins, described the highest state of moral certainty as a state of certitude that "though there be no natural necessity, that such things be so, and that they cannot possibly be otherwise . . . yet may they be so certain as not to admit of any reasonable doubt concerning them."[4] Wilkins' distinction between mathematical certainty on one hand and empirical or moral certainty on the other was incorporated as an illustration of the definition of "moral certainty" in early nineteenth century America.[5]

The legal standard of proof beyond a reasonable doubt, developed from the philosophical concepts of the seventeenth century, appeared in decisions of the English and American judiciaries in the late 1700s, and was adopted by the states during the 1800s with various verbal formulations.[6] An extended discussion of the reasonable doubt concept by Chief Justice Shaw in *Commonwealth v. Webster*, 59 Mass. 295 (1850), provided the basis for the "moral evidence/moral certainty" jury instruction adopted during the latter half of the nineteenth century

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certainty attainable about human affairs. *See, e.g.*, Waldman, *op. cit.*, p. 304, quoting from Boyle, *Works*, vol. IV 182 (1772) ("the conclusions of a moral demonstration are the surest, that men aspire to, not only in the conduct of private men's affairs, but also in the government of states, and even of the greatest monarchies and empires . . . [and] may well amount to a moral certainty").

[4] Wilkins, *Of the Principles and Duties of Natural Religion* 7-8 (1675).

[5] Noah Webster, in *An American Dictionary of the English Language* (1828), defined "moral," inter alia, as follows:

> Supported by the evidence of reason or probability; founded on experience of the ordinary course of things; as *moral* certainty, distinguished from *physical* or *mathematical* certainty or demonstration. Wilkins—"Physical and mathematical certainty may be stiled [sic] infallible, and moral certainty may be properly stiled [sic] indubitable."

[6] See Morano, *supra*, at 519-524.

by several courts, including the Supreme Court of California in *People v. Strong*, 30 Cal. 151 (1866).[7]

Contemporary constitutional standards are essentially congruent with the core concept of proof beyond a reasonable doubt as articulated by Wilkins and others more than 300 years ago, and as explained in terms of moral evidence and moral certainty as those terms were *then* understood. The constitutional question arises from California's continuing use of the antiquated instruction, particularly the phrases "moral evidence" and "moral certainty," to explain reasonable doubt to contemporary juries. The original meaning of those phrases has been lost and the contemporary meanings are flatly inimical to the core concept of proof beyond a reasonable doubt.

B. Constitutionally Adequate Explanations of the Concept of Proof Beyond a Reasonable Doubt.

Judicial explanations of the concept of proof beyond a reasonable doubt must "convey the critical point that, while absolute certainty is unnecessary, a belief in guilt at least *approaching* absolute certainty *was* required." *Lanigan v. Maloney*, 853 F.2d 40, 47 (1st Cir. 1988) (emphasis in original). There are essentially two approaches to reasonable doubt definitions: definitions by adjective or synonym, and definitions by analogy or illustration. The former consists of parallel words or phrases whose ameliorative effect depends entirely on whether the purported synonyms and/or adjectives are in fact accurate renditions of the core concept *and* comprehensible to the ordinary juror. This Court has provided examples of appropriate synonyms, including the "utmost certainty" language of *Winship* and the "state of near certitude" language of *Jackson v. Virginia*, 443 U.S. at 315.

The instruction in this case also falls into this category, positing "moral certainty" as a synonym or proxy for "beyond a reasonable doubt." The value of exclusive

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[7] See Morano, *supra*, at 523.

reliance on this approach, and more specifically the utility of the "moral certainty" proxy, was questioned by commentators [8] and by this Court [9] even before the turn of the century.

In the second category of definition by analogy or illustration, this Court has also approved certain formulations, most notably that in *Hopt v. Utah*, 120 U.S. 430, 480 (1887), affirming the validity of the following instruction:

> The court charges you that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt. That if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find him not guilty. You are further instructed that you cannot find the defendant guilty unless, from all the evidence, you believe him guilty beyond a reasonable doubt. The court further charges you that a reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you then truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

This Court noted the value of illustration in explaining reasonable doubt to a jury:

> It is difficult to conceive what amount of conviction would leave the mind of a juror free from a reasonable doubt, if it be not one which is so settled and fixed as to control his action in the more weighty and important matters relating to his own affairs. Out of the domain of the exact sciences and actual observation, there is no absolute certainty. The guilt of the accused, in the majority of criminal cases, must necessarily be deduced from a variety of circumstances leading to proof of the fact. Persons of speculative minds may in almost every such case suggest possibilities of the truth being different from that established by the most convincing proof. The jurors are not to be led away by speculative notions as to such possibilities.
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> * * * *
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> . . . [I]t has been the general practice in this country of courts holding criminal trials to give such explanation or illustration. The rule may be, and often is, rendered obscure by attempts at definition, which serve to create doubts instead of removing them. *But an illustration like the one given in this case, by reference to the conviction upon which the jurors would act in the weighty and important concerns of life, would be likely to aid them to a right conclu-*

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[8] An influential article by May, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 Am.L.Rev. 642 (1876), lambasted the interjection of the moral certainty language into the reasonable doubt instruction on the ground that it created more rather than less confusion, and is quoted with approval in Wigmore:

> The result of the evidence must be, says Mr. Starkie, a "moral certainty, to the exclusion of all reasonable doubt." Now, why perplex the administration of justice by interjecting this new element of uncertainty? Why not leave the courts and juries alone to grapple as best they may with the difficulty of determining, without any test, what constitutes a reasonable doubt, without adding to that difficulty the certainly equal difficulty of determining what constitutes a moral certainty? *What possible end can such a heaping up of indefinable terms serve, but to confuse and baffle rather than enlighten and aid the average juror?*

Wigmore on Evidence § 2497 at 410 (9th ed.) (emphasis supplied).

[9] In 1877, this Court questioned the use of moral certainty as a proxy for reasonable doubt in *Hopt v. Utah*, 120 U.S. 430, 440 (1887) (criticizing the "moral certainty" language from *Commonwealth v. Webster*—"the difficulty is that the words 'to a reasonable and moral certainty' add nothing to the words 'beyond a reasonable doubt'; one may require explanation as much as the other").

> *sion, when an attempted definition might fail.* If the evidence produced be of such a convincing character that they would unhesitatingly be governed by it in such weighty and important matters, they may be said to have no reasonable doubt respecting the guilt or innocence of the accused, notwithstanding the uncertainty that attends all human evidence. The instruction in the case before us is as just a guide to practical men as can well be given; and if it were open to criticism, it could not have misled the jury, when considered in connection with the further charge, that if they could reconcile the evidence with any reasonable hypothesis consistent with the defendant's innocence, they should do so, and in that case find him not guilty. The evidence must satisfy the judgment of the jurors as to the guilt of the defendant, so as to exclude any other reasonable conclusion. (Emphasis supplied.)

United States v. Holland, 348 U.S. 121 (1954) expressed continuing concern regarding judicial efforts to define reasonable doubt, and indicated that the illustrative explanation of reasonable doubt should be phrased in terms of "the kind of doubt that would make a person *hesitate* to act", *id.* at 140 (emphasis supplied), "rather than the kind on which he would be *willing* to act". *Id.*

The virtue of this approach is that it provides the average juror with a common-sense reference point. Resting on the assumption that serving on a jury and rendering a just verdict is one of the most important of a citizen's affairs, it provides the juror with a practical analogy by which to evaluate whether the prosecution's case compels the "subjective state of certitude of the facts in issue" required by *Winship*. 397 U.S. at 364.

The federal circuits which endorse an instruction explanning reasonable doubt generally follow the model that was approved by this Court in *Holland, supra*.[10]

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[10] The Third, Eighth, Tenth, and District of Columbia Circuits endorse pattern jury instructions of that nature. *Blatt v. United States*, 60 F.2d 481 (3d Cir. 1932); *Friedman v. United States*, [381] F.2d 155 (8th Cir. 1967); *United States v. Pepe*, 501 F.2d 1142 (10th Cir. 1974); *United States v. Merlos*, 984 F.2d 1239 (D.C. Cir. 1993). The Fourth and Seventh Circuits recommend against any explanatory instruction. *United States v. Headspeth*, 852 F.2d 753 (4th Cir. 1988); *United States v. Hall*, 854 F.2d 1036 (7th Cir. 1988). The First, Second, Fifth, Sixth and Ninth Circuits leave the determination as to a definitional instruction to the district court's discretion. *United States v. Littlefield*, 840 F.2d 143 (1st Cir. 1988); *United States v. Ivie*, 700 F.2d 51, 69 (2d Cir. 1983); *Thompson v. Lynaugh*, 821 F.2d 1054 (5th Cir. 1987); *Whiteside v. Park*, 705 F.2d 869 (6th Cir. 1983); *United States v. Nolasco*, 926 F.2d 869 (9th Cir. 1991) (en banc).

Some jurisdictions include both simile and synonym in their definitions, *e.g., District of Columbia Criminal Jury Instructions* no. 2.09 (3d ed. 1978):

> Reasonable doubt, as the name implies, is a doubt based on reason, a doubt for which you can give a reason. It is such a doubt as would cause a juror, after careful and candid and impartial consideration of all the evidence, to be so undecided that he cannot say that he has an abiding conviction of the defendant's guilt. It is such a doubt as would cause a reasonable person to hesitate or pause in the graver or more important transactions of life. However, it is not a fanciful doubt nor a whimsical doubt, nor a doubt based on conjecture. It is a doubt which is based on reason. The government is not required to establish guilt beyond all doubt, or to a mathematical certainty. Rather, its burden is to establish guilt beyond a reasonable doubt.

That instruction was reaffirmed in *United States v. Merlos*, 984 F.2d 1239, 1241 (D.C. Cir. 1993) (finding constitutional error in a variation on the pattern jury instruction where the trial judge substituted the weaker phrase "strong belief" instead of the District of Columbia's phrase, "abiding conviction" or the Federal Judicial Center's phrase, "firmly convinced").

As the opinions of this Court and other federal courts indicate, there is a wide variety of formulations which

conveys accurate and accessible explanations of proof beyond a reasonable doubt. What they have in common is the concept of utmost certainty possible within the context of ordinary human affairs. *Hopt v. Utah, supra*; *Lanigan v. Maloney, supra.*

II. RECOGNIZED DEFECTS IN INSTRUCTIONS ON THE STANDARD OF PROOF BEYOND A REASONABLE DOUBT.

Courts have been reviewing reasonable doubt instructions for more than a century, and certain defects have been identified. One instructional pitfall consists of *understating* the degree of *certainty* necessary to convict. For example, an instruction that proof beyond a reasonable doubt means a 51 percent chance that the prosecution's accusation is true would patently understate the standard of proof. This type of defect was identified as constitutional error in *United States v. Merlos*, 984 F.2d at 1241, where the trial judge substituted the weaker phrase "strong belief" in place of constitutionally adequate alternatives such as "abiding conviction" or "firm convict[ion] of the guilt of the accused. *Id.*

Another instructional defect consists of *overstating* the degree of *doubt* necessary to acquit. For example, an instruction that a reasonable doubt must be at least as large as the degree of doubt adults have about the existence of Santa Claus or extraterrestrials patently overstates the size of doubt necessary to acquit. This type of defect was identified in *Cage v. Louisiana*, 498 U.S. 39 (1991) by the use of the phrases "substantial doubt" and "grave uncertainty" as purported synonyms for reasonable doubt.

A third instructional defects invites jurors to reach the degree of certainty necessary to convict (regardless of whether correctly stated) based on factors *independent* of, or even *regardless* of, the evidence in the case. This type of defect has been identified primarily in instructions using the "moral certainty" language, which invites the jury to include moral and/or emotional responses to the

defendant and the crime in its deliberations, in derogation of all objective evaluation of the prosecution's evidence. *See State v. Bryant*, 432 S.E.2d 291, 297 (N.C. 1993): "A [moral certainty] jury instruction which emphasizes what is good or bad—a moral judgment, rather than truth—an evidentiary judgment, is inconsistent with the role of the jury in deciding the guilt or innocence of the defendant."; *Perez v. Irwin*, 963 F.2d 499 (2d Cir. 1992) ["the concern is that the use of the words [moral certainty] might lead a jury to reach a verdict based on feelings rather than on the facts of the case"]; *Morley v. Stenberg*, 828 F.Supp. 1413 (D.Neb. 1993), [moral certainty language defective because of concern that juries might feel justified in convicting based on emotion rather than factual evidence]. This type of instructional defect invites the jury to base its decision on feelings rather than facts, on emotions rather than evidence, to the detriment of an accused.

Cage v. Louisiana, 498 U.S. at 41, referred to "moral certainty" language as one of the grounds for finding the challenged instruction unconstitutional. As *Morley v. Stenberg*, *supra*, subsequently pointed out, this reference reflects this Court's concern for either or both defects of understating the degree of certainty necessary to convict, and deflecting the jury from evidence to feelings and emotions. Petitioner now turns to a discussion of the defects of the instruction given in this case, after which petitioner will show that this instruction, viewed in its entirety, is more defective than the instruction in *Cage* in each of these respects.

III. THE CONSTITUTIONAL DEFECTS IN THE REASONABLE DOUBT INSTRUCTION GIVEN IN THIS CASE.

Petitioner's jury was instructed as follows:

> Reasonable doubt is defined as follows: "It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is

> open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge." J.A. 49.

This definition, consisting of a passage extracted from the larger discussion of reasonable doubt in *Commonwealth v. Webster, supra,* contains each of the three types of defects identified above.[11]

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[11] The following is the entire passage in *Webster* which includes the instructional segment given in this case, as indicated by the shaded portions:

> Another rule is, that the circumstances taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty, that the accused, and no one else, committed the offence charged. It is not sufficient that they create a probability, though a strong one; and if, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proof fails. It is essential, therefore, that the circumstances taken as a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis. The evidence must establish the *corpus delecti*, as it is termed, or the offence committed as charged; and, in case of homicide, must not only prove a death by violence, but must, to a reasonable extent, exclude the hypothesis of suicide, and a death by the act of any other person. This is to be proved beyond reasonable doubt.
>
> Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved by. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it.

Commonwealth v. Webster, 59 Mass. at 119-120.

A. The Instruction Understated the Constitutionally Required Degree of Certainty.

The degree of certainty required of jurors is entirely contingent on their understanding of the meaning of the phrase "moral certainty" in the jury instruction. The instruction, awkwardly phrased in the negative, defines reasonable doubt as "the minds of jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge." By necessary implication, proof beyond a reasonable doubt would be a condition in the minds of jurors that they *can* say they feel an abiding conviction, to a moral certainty, of the truth of the charge.[12]

The phrase "abiding conviction" in this context is clearly modified by the phrase "to a moral certainty," which sets the standard of certitude. In this grammatical construction, the phrase "abiding conviction" does not have any independent effect in conveying a standard of proof. Rather, it simply indicates that the trier of fact must be very sure that the standard of proof, otherwise defined, has been met. For example, a procedural rule could permit a magistrate to bind a defendant over to stand trial only upon an abiding conviction that there was a *reasonable suspicion* that the defendant had committed the crime; a similar rule could permit a jury to find a defend-

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[12] The discussion in *Webster* quoted above, from which the California instruction has been extracted, contained an explicit and extensive affirmative description of proof beyond a reasonable doubt, wholly lacking in the California excerpt.

ant not guilty by reason of insanity only upon an abiding conviction that the defendant has demonstrated insanity by a *preponderance of the evidence*. In this usage, the phrase "abiding conviction" does not set the standard of proof, but rather emphasizes that the standard of proof must be met.[13]

The question becomes one of determining what level of certitude jurors would likely understand by the phrase "to a moral certainty." To this end, petitioner has begun with a review of available dictionaries, several of which define the phrase "moral certainty" in the course of listing the various meanings of the single word "moral." This inquiry reveals that the phrase "moral certainty" has accumulated multiple meanings in contemporary usage. A primary meaning, clearly *in*consistent with the concept of proof beyond a reasonable doubt, defines "moral certainty" in terms of a "probability," and specifically contrasted to something being "proven." For example, the *Longman Dictionary of the English Language* (1984) definition is "very probable though *not* proved; virtual (*a moral certainty*)." *Id.* at 951, col. 2. *Chambers 20th Century Dictionary* (1983) defines moral certainty as "a likelihood great enough to be acted on, although not capable of being certainly proved." *Id.* at 820, col. 2. *Merriam-Webster's Collegiate Dictionary* (10th ed. 1993) defines "moral certainty" as "probable though not proved;

[13] In a more colloquial context, police officers from time to time entertain or express an "abiding conviction," in the *absence* of presently available evidence, that a certain individual, ostensibly blameless, is in fact a behind-the-scenes criminal mastermind, and set themselves the task of investigating and obtaining objective evidence. Indeed, this scenario has provided the dramatic gist for innumerable television detective shows, such as *The Untouchables*, in which the plot consists of law enforcement efforts to pierce the veil of legitimacy assumed by a crafty individual, whom the police are convinced is an arch-criminal, and obtain sufficient evidence for a prosecution. The point is that an "abiding conviction" of wrongdoing is in no way a necessary proxy for proof beyond a reasonable doubt.

virtual." *Id.* at 756, col. 2. *Webster's New World Dictionary of American English* (3d college ed. 1988, 1991) defines "moral certainty" as "[b]ased on strong probability." The 1988 edition of *Webster's New World Dictionary* (3d college ed. 1988) also defines moral certainty as "based on strong probability." *Id.* at 882, col. 2. The *Random House Webster's School & Office Dictionary* (1993) includes the definition "based on strong probability: *a moral certainty.*" *Id.* at 294, col. 2. The *Random House Dictionary of the English Language* (3d ed. 1987) includes the definitions "resting upon convincing grounds of probability; virtual: a moral certainty." The *Collins English Dictionary* (3d ed.) includes among the meanings of "moral" the phrase "having a strong probability: a moral certainty." The *Shorter Oxford English Dictionary on Historical Principles* (1992) defines "moral" as "[u]sed to designate that kind of probable evidence which rests on a knowledge of character and of the general tendencies of human nature; often more loosely applied to all evidence which is merely probable."

The clear import of these definitions is that the phrase "moral certainty" in contemporary parlance means a level of certainty distinctly *below* that required by proof beyond a reasonable doubt. To the extent "moral certainty" is currently understood as denoting only the probability or even a strong probability of a fact, it is *in*consistent with the requirement of "utmost certainty" enunciated in *Winship, supra,* and instead conveys a meaning far more consistent with the legal concept of "preponderance of the evidence," or at most "clear and convincing evidence."[14]

[14] To demonstrate how far contemporary usage of the "moral certainty" terminology has departed from the original conception of this terminology, it is instructive to note that *Black's Law Dictionary* (6th ed.) faithfully retains the 19th century meaning:

> That degree of assurance which induces a man of sound mind to act, without doubt, upon the conclusions to which it leads. A high degree of impression of the truth of the fact, falling short of absolute certainty, but sufficient to justify a verdict of guilty, even in a capital case. Such signifies a probability

Recent cases condemning jury instructions which include "moral certainty" language have relied on these current dictionary definitions in reaching their results. For example, *State v. Bryant,* 432 S.E.2d 291 granted a new trial because of a constitutional invalid reasonable doubt instruction predicated on a standard of "moral certainty":

> We believe the crucial term in the reasonable doubt instruction condemned by the United States Supreme Court in *Cage* is "moral certainty." The correct standard for conviction beyond a reasonable doubt is evidentiary certainty rather than moral certainty.
>
> A moral certainty may exist when a thing is "probable though not proved." *Webster's Ninth Collegiate Dictionary* 771 (9th ed. 1991). A moral certainty may exist when something is "based upon strong likelihood or firm conviction, rather than upon the actual evidence or demonstration." *The American Heritage Dictionary* 852 (1979). 432 S.E.2d at 297.

Even prior to this Court's identification of the moral certainty language as a defective component of the Louisiana instruction, federal cases were generally consistent in condemning the moral certainty language as a component of a reasonable doubt instruction. *See, e.g., Perez v. Irwin, supra,* ["the concern is that the use of the words (moral certainty) might lead a jury to reach a verdict based on feelings rather than on the facts of the case"]; *Lanigan v. Maloney,* 853 F.2d 40, 47 (1st Cir. 1988); *United States v. Del Toro Soto,* 676 F.2d 13, 17 (1st Cir. 1982); *State v. Manning,* 409 S.E.2d 372 (S.C. 1991) [reversing capital murder conviction because of due process deficiencies in "moral certainty" reasonable doubt instruction]; *People v. Hewlett,* 519 N.Y.S.2d 555

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sufficiently strong to justify action on it; a very high degree of probability, although not demonstrable, as a certainty. It has also been used as indicating a conclusion of the mind established beyond a reasonable doubt. (*Gray v. State,* 56 Okl. Cr. 208, 38 P.2d 967.)

(App.Div. 1987) [reversible error in defining reasonable doubt in terms of "moral certainty" and "reasonable degree of certainty"]. *See also People of Territory of Guam v. Yang,* 800 F.2d 945, 952 (9th Cir. 1986) [indicating that the Ninth Circuit is "strongly . . . inclined to side with those jurisdictions that reject the 'moral certainty' language"].

B. The Instruction Overstated the Degree of Doubt Necessary to Acquit.

By an array of negatives as to what reasonable doubt is *not,* the instruction given in this case incorrectly informs the jury that reasonable doubt is some larger, more concrete, or more identifiable factor than is constitutionally permissible. The instruction reads that reasonable doubt "is not a mere possible doubt." The fact that the instruction is phrased in the negative does not in any way insulate it from the *Cage* analysis, which condemned an instruction containing affirmative overstatements of the quantum of doubt necessary to acquit, i.e., substantial doubt or grave certainty. Presumably the result in *Cage* would have been the same if the instruction had been framed in the negative, e.g., "reasonable doubt is not a doubt falling short of substantial, nor is it an uncertainty less than grave."

The defect in the "possible doubt" formulation in this case is that by its very nature, all doubt is necessarily "possible" rather than "actual" or "probable." Reasonable doubt in the legal context is intended to convey the *possibility* that the accused is not guilty despite substantial proof. If the jury is instructed in effect that reasonable doubt is *more* than the possibility of error in the prosecution's assertion of the guilt of the accused, the jury has been misled and the degree of doubt has been overstated.

The likelihood of juror misunderstanding is increased by the instruction's assertion that "everything . . . is subject to possible or imaginary doubt." The problem here is that the phrase "imaginary doubt" is juxtaposed to

"possible doubt" and suggests a scale of doubt ranging from non-existent at one pole, through imaginary, down to "possible," and continuing on to actual or substantial doubt, eventually reaching an alternative endpoint of complete doubt or disbelief. The constitutional problem is that if a jury is told that reasonable doubt is not a "mere possible doubt," but by implication must be something greater, then the jury is all too likely to understand the magnitude of a reasonable doubt necessary to acquit as the functional equivalent of "an actual substantial doubt" or a "grave uncertainty." [15]

For these reasons, the phrase "not . . . [a] possible doubt" has been recently and roundly condemned as a component of a reasonable doubt jury instruction in *State v. Chavarria*, —— P.2d ——, 93 Westlaw, 313170 (Ariz.App. 1993), which found error in the Recommended Arizona Jury Instruction ("RAJI") regarding reasonable doubt.[16] The offending phrase instructed that reasonable doubt "does not mean an imaginary or possible doubt":

[15] Given that the phrase "substantial doubt" overstates the degree of doubt necessary to acquit, then the phrase "possible doubt" should be viewed as more *correctly* characterizing the proper constitutional concept. The instruction condemned in *Cage* specifically juxtaposed the two phrases as alternative formulations of the same idea: "A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt." 498 U.S. at 40.

It turns out under this Court's jurisprudence that Louisiana had it wrong, i.e., that reasonable doubt is not so large as an "actual substantial doubt." The "possible doubt" phrasing, obviously intended by the instruction to convey a slightly lower quantum of doubt than "substantial doubt," would thus be a more correct formulation after all.

[16] The full instruction reads as follows:

> The law does not require a defendant to prove innocence. Every defendant is presumed by law to be innocent. The State must prove the defendant guilty beyond a reasonable doubt. This means the State must prove each element of the charge beyond a reasonable doubt. The term reasonable doubt means doubt based upon reason. *This does not mean an imaginary or possible doubt.* It is a doubt which may arise in your minds after a careful and impartial consideration of all the evidence or from the lack of evidence. (Emphasis supplied.)

> [T]he RAJI optional definition, in our opinion, not only adds 'nothing helpful to the phrase' [citing *Wigmore on Evidence*, § 2497 at 408-409 (Chadbourn rev. 1981)], but has the affirmative potential to confuse. Though it suggests that a 'possible doubt' is insufficient to amount to a 'reasonable doubt,' the meaning of 'possible doubt' is elusive in itself. One juror might regard a possible doubt as a passing notion that fails to blossom into doubt. *But another might seize on the element of possibility and conclude that any doubt that fails to rise to the level of probability does not qualify as a reason to acquit.* 93 Westlaw 313170:3; emphasis supplied.

Chavarria then referred to the discussion of the defects in the "possible doubt" phrase in *People v. Brigham*, 25 Cal.3d 283, 296 (1979) (Mosk, J., concurring), and concluded that "the counterposition of possible and reasonable doubts in the RAJI optional instruction might lead juries to exclude appropriate possibilities from their deliberations," requiring "that it should be abandoned from any future use," 93 Westlaw 313170:4.[17] *See also*

[17] Justice Mosk of the California Supreme Court, concurring in *People v. Brigham*, 25 Cal.3d at 296, similarly criticized the use of the phrase:

> Finally, even if the archaic phrase "moral evidence" were omitted, the first sentence of the definition of reasonable doubt would remain essentially ambiguous. Its message to the jury is that reasonable doubt is not a "possible" doubt. Whether this statement helps or hinders, however, depends entirely on how each juror understands the key word "possible." Unfortunately the word has many meanings, and the instruction does not define it. If the juror were to take it in the sense of "potential"—as opposed to "actual"—the statement would perhaps be intelligible. But that is not the primary meaning of "possible"; much more commonly it simply denotes that which can be or can become—as opposed to "impossible." Yet if it is so understood, the instruction again mystifies the juror: it begins by informing him he must vote to acquit if he has a

State v. Williams, 828 P.2d 1006, 1019 (Ore. 1992) ("the phrase 'open to some possible or imaginary doubt' is not instructive, and we discourage its use").

In sum, the fundamental flaw in this aspect of the reasonable doubt instruction given in this case is that the essence of reasonable doubt is the contemplation of alternate possibilities, *not* probabilities or certainties. The commonsense and current usage strongly implies that if a jury understands that the degree of doubt necessary to acquit must be greater than a possibility, it must be a *probability* of innocence, i.e. an overstatement of the degree of doubt necessary to acquit just as *Cage* condemned. This is an unconstitutional formulation, and it is particularly prejudicial in the California instruction because it reinforces the *under*statement of the degree of certainty necessary to convict, tied as it is to "moral certainty."

C. The Instruction Invited the Jury to Supplant the Objective Evaluation of the Prosecution's Evidence With Improper Reliance on Moral Considerations and Personal Predilections.

1. *The "moral certainty" problem.*

Several of the cases discussed by petitioner above recognize that the inclusion of the term "moral certainty" in a reasonable doubt jury instruction invites the jury to base their decision on feelings rather than facts, on emotion rather than on evidence. *Morley v. Stenberg, supra*; *Perez v. Irwin, supra.*

Petitioner believes that these cases, critical as they are of the "moral certainty" language, nonetheless *understate* the harmful effect of tying proof beyond a reasonable doubt to the phrase "moral certainty," particularly when combined with the reference to "moral evidence."

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reasonable doubt, then it tells him that such a doubt is not possible. "Thus not only is it not helpful to distinguish '*possible* doubt' from '*reasonable* doubt,' it is downright confusing." (Sinetar, *supra*, at p. 554.)

The phrase "moral certainty" has acquired an additional meaning, apart from the mere "probability" definition noted. A cluster of current dictionary definitions define "moral certainty" as a strong personal belief in a particular fact or idea in the *absence* of or *regardless* of objective evidence. For example, *Webster's Third New International Dictionary—Unabridged* (1986) defines "moral certainty" as "based on an inner conviction"; and "virtual rather than actual, immediate, or completely demonstrable." *Id.* at 1468, col. 3. The *American Heritage Dictionary of the English Language* (3d ed. 1993) includes the following definition: "Based on a firm conviction, rather than on the actual evidence: *a moral certainty.*" *Id.* at 1173, col. 2. The *American Heritage Dictionary, Second College Edition* (1985) has: "Based upon strong likelihood or firm conviction, rather than upon the actual evidence: *a moral certainty.*" *Id.* at 814, col. 1. The *American Heritage College Dictionary* (3d ed. 1993) contains this definition of "moral," without the further reference to moral certainty: "Based on strong likelihood or firm conviction, rather than on the actual evidence." *Id.* at 886, col. 2. And the *American Heritage Dictionary of the English Language* (1981): "Based upon strong likelihood or firm conviction, rather than upon the actual evidence or demonstration: *a moral certainty.*" *Id.* at 852, col. 2. *Webster's II New Riverside Dictionary* (1984, 1988) also defines "moral certainty" as "[b]ased on strong likelihood of conviction rather than on solid evidence." *Id.* at 769, col. 1. *A Dictionary of American-English Usage* (1957) notes that "*moral certainty* is always applied to what is in fact an uncertainty. Though this peculiar sense of *practical* or *virtual* in combination with *certainty* is hard to account for, it is established as idiomatic." *Id.* at 350, col. 1-2.[18]

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[18] It appears that among the array of available dictionaries, only the historically-oriented Oxford series, with its emphasis on historical meanings, retains a definition consistent with the concept of proof beyond a reasonable doubt. This series of diction-

In addition to dictionary definitions, the actual usage of a word or phrase in ordinary discourse also indicates its currently understood meaning. One use of the moral certainty phrase perhaps most familiar to this Court occurred in *In re Grand Jury Witness Margaret Heutsche*, 414 U.S. 898 (1973) (Douglas, J., dissenting from denial of certiorari), in which Justice Douglas made the following statements regarding the pervasiveness of wire tapping in the course of his analysis: "We who live in the District of Columbia know that electronic surveillance is commonplace. *I am indeed morally certain that the Conference Room of this Court has been 'bugged'*; and President Johnson during his term in the White House asserted to me that even his phone was tapped." *Id.* (emphasis supplied.)

While Justice Douglas did not fully explain what he meant by the phrase "morally certain," it is eminently

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aries is of course dedicated to preserving historical meanings, regardless of current usage. The historical emphasis of the Oxford series is described, inter alia, in Landau, *Dictionaries: The Art and Craft of Lexicography* (1984), noting that "[t]he OED . . . provides a historical record of the development and meaning of each word" (71). For example, the *Oxford English Dictionary* (2d ed. 1989) describes the term "moral certainty" as "slang" chiefly used in Australia, *id.* at vol. IX, 1068, col. 1, and defines the term as:

> Used to designate that kind of probable evidence that rests on a knowledge of the general tendencies of human nature, or of the character of particular individuals or classes of men; often in looser use, applied to all evidence which is merely probable and not demonstrative. *moral certainty*: a practical certainty resulting from moral evidence; a degree of probability so great as to admit of no reasonable doubt. *Id.* at vol. IX, 1070, col. 1.

The *Concise Oxford Dictionary* (1990), 770, col. 1, defines moral certainty as a "probability so great as to allow no reasonable doubt." The *Oxford American Dictionary* (1980) defines moral certainty as "a probability so great that no reasonable doubt is possible." *Id.* at 432, col. 1. The *Cassell Paperback English Dictionary* (1990) defines moral certainty as a "probability that leaves little doubt." *Id.* at 868, col. 1.

apparent that he was *not* saying that he knew of proof beyond a reasonable doubt that the conference room of this Court had been bugged. If the reader substitutes the phrase "I believe with the utmost certainty based on the strength of the evidence" for "morally certain," the resultant meaning obviously differs from that intended by Justice Douglas. The original sentence clearly conveys the meaning that Justice Douglas firmly believed that the conference room had been bugged, based *not* on specific evidentiary support, but rather on his personal conviction about the likely conduct of others, in this case law enforcement agencies. It is this meaning of "moral certainty" which has gained substantial currency in contemporary American usage during the last 25 years, but which is anathema to the constitutional requirement that a jury convict only on the basis of *evidentiary* certainty.[19]

As an additional demonstration of the current meaning of "moral certainty" in popular discourse, petitioner has selected representative examples of the use of the phrase "moral certainty" in the press during the past ten years.[20] For example, an op/ed piece by Meg Greenfield in the Washington Post of March 20, 1985, entitled "Why We're Still Muckraking," reflected on the skepticism of an investigative journalist to take anything at face value, even if there is no identifiable indication of an underlying problem—"we are morally certain that if we just yank open one more closet door the corpse will fall out." This

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[19] The accompanying phrase "abiding conviction" is wholly redundant when connected with "moral certainty." As set forth below, the latter has come to connote a personal commitment to a position to the point of obstinacy to a particular position regardless of the facts.

[20] Reference to current usage as reflected in newspapers has been employed by this Court as an aid to discerning what meaning jurors would likely glean from a phrase. See *Arave v. Creech*, —— U.S. ——, 123 L.Ed.2d 188, 206 (1993) (Blackmun, J., dissenting).

usage parallels that of Justice Douglas above, and emphasizes the notion of a personal and individual conviction based not at all on evidentiary support.

The phrase is commonly used in descriptions of partisan positions taken in struggles over abortion-related issues. For example, the Atlanta Constitution of Sunday, July 9, 1989 carried an editorial by Harrison Hickman which commented that the pro-life legislators "must show how they would reconcile their moral certainty with the behavioral reality of the 1990s." If the reader substitutes as a possible synonym for "moral certainty" the phrase "utmost certainty based on the strength of evidence," the sentence makes no sense. If, on the other hand, the reader substitutes a phrase such as "strong conviction based on personal values," the sentence clearly retains its original meaning. Similarly, the Richmond Times-Dispatch of August 27, 1993, in an editorial article entitled *Abortion Violence*, criticized a Florida priest who attempted to characterize the shooting of abortion doctors as "justifiable homicide"—"that is the voice of individuals for whom moral certainty has shaded into fanaticism, defined as the belief that the end justifies the means." Again, petitioner suggests that the reader alternately substitute the two phrases "utmost certainty based on the strength of evidence" and "strong conviction based on personal values" for the phrase "moral certainty," and decide which expresses the intended meaning of the sentence.

The same exercise yields similar results in the context of many instances of current uses of the "moral certainty" phrase. An article by John Allemang in the Atlanta Constitution of July 21, 1991 described the polarization of American society in terms of moral certainty—"the uncompromising tone of moral certainty is clear. Social justice becomes rough justice." The clear implication is that individuals or groups driven by moral certainty act according to their general values, not in accordance with a case-by-case approach.

Similarly, an article in the San Francisco Examiner of July 14, 1993 regarding the picketing of an abortion clinic in San Jose characterized the implacable attitudes on both sides as follows—"with unflagging determination throughout the long hot day, the two sides held their bitter ground, sustained by moral certainty and shielded by several coats of sunscreen." Other examples include the editorial entitled *America's Loss of Respect* in the January 25, 1992 edition of the Sacramento Bee, lamenting a lack of moral certainty in American international leadership, and contrasting this with the success enjoyed by Winston Churchill during World War II—"Churchill's speeches, morally certain, impregnated with the imagery of justice and patriotism, were his most powerful wartime instrument." Another Sacramento Bee editorial of January 24, 1990, lamented that a Jewish refugee from the Soviet Union, having immigrated to Israel, had his leadership capacity blunted by the complexities of Israeli politics—"As [Sharansky] spoke and answered questions at his talk at the University of California, Davis, last week, the moral certainty that made his example so luminous as a refusenik seemed never to move out of the stultifying shadow of Yitzhak Shamir." The phrase "moral certainty" in both uses clearly refers to personal conviction and inner strength rather than objective certainty arising from extrinsic evidence.[21] These examples of recent uses

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[21] Virtually the *only* instances in which the phrase "moral certainty" is used in published sources with a meaning consistent with the concept of proof beyond a reasonable doubt are those where a judge or lawyer is quoted using the phrase as a term of art. For example, Mary Sue Terry, Democratic candidate for governor of Virginia, was quoted in the May 13, 1993 Richmond Times-Dispatch that during her years as Attorney General she never "blindly" advocated to support a death sentence—"I would always satisfy myself beyond a reasonable doubt, and to a moral certainty, that the person had a fair trial and was guilty of the crime". Page B-5. Similarly, a Los Angeles Superior Court judge was quoted in the March 5, 1992 Los Angeles Times as declining to find a litigant in contempt for violation of a court order because "he couldn't find to a moral certainty that [the litigant] was not

confirm the case law that the phrase "moral certainty" means "based on feeling . . . rather than fact," *United States v. Indorato*, 628 F.2d 711, 721, n. 8 (1st Cir. 1980), and based "upon a subjective feeling rather than upon an evaluation of the evidence," *State v. Manning*, 409 S.E.2d 372 (S.C. 1991).

2. *The "moral evidence" problem.*

Nor does "moral evidence" currently mean what it did during the eighteenth and nineteenth centuries, when it signified empirical proof of matters relating to human affairs. Rather, it presently connotes matters relating to the ethics or morality of a particular situation, rather than the objective, verifiable facts comprising the situation. While the phrase does not have widespread use in print,[22] instances where it does appear highlight the contrast in meaning to factual or objective evidence. *See, e.g.*, Los Angeles Times, December 24, 1990, Metro section at 8, in which a citizen complains of actions by the Board of Supervisors—"[The supervisors'] brazen act ramming this sordid business through, despite all the factual and moral evidence against it, turns my stomach."

Similarly, in an editorial in the May 1, 1986 Miami Herald entitled *Waldheim: The Moral Evidence Is Overwhelming*, the writer described the efforts of Austrian politican Kurt Waldheim to run for elective office, in spite of the widespread belief that he collaborated with Nazis in war crimes during World War II. The writer

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telling the truth" regarding an apparent violation. Southeast section at 4.

The discontinuity between the usage of the phrase by members of the legal profession and that of the public at large suggests the strong probability that neither group appreciates the meaning of the language as understood by the other, and that the very words which law-trained persons hear as *reiterating* the venerable expression of an exacting burden of proof are heard by jurors as *diluting* that burden.

[22] The phrase "moral evidence" seldom appears in dictionaries; one exception is the *Collins English Dictionary* (3d. ed.)—"based on knowledge of the tendencies of human nature."

noted that the current "president of Austria, a former jurist, has seen some of the evidence against Waldheim and said he finds it insufficient for prosecution," causing the writer to conclude, "legally, there will never be a case against Waldheim," but "the moral evidence is overwhelming."

In fact, the phrase "moral evidence" evokes a notion very close to "character evidence," barred by state and federal evidentiary rules from use by the prosecution to paint a picture of a criminal lifestyle or background as proof of a particular criminal act charged. Unfortunately, the California jury instruction with its imprimatur on the consideration of "moral evidence" invites the jury to do just what the Evidence Code and due process guarantees forbid. The prosecutor took full advantage of this opening in this case, branding petitioner in argument as a "heathen." RT 5619. Where, as in California, the jury is specifically told that its decision may be based on the consideration of "moral evidence" and all that they need to convict is a "moral certainty," a defendant such as petitioner faces an unacceptably high likelihood of an unfair and unconstitutional verdict.

Use of "moral evidence" language in reasonable doubt instructions has come in for increasing judicial criticism. Justice Mosk, concurring and dissenting in *People v. Brigham*, 25 Cal.3d at 295, observed that "[t]he most serious pitfall [in CALJIC 2.90] is the phrase 'moral evidence,'" finding it confusing to contemporary jurors. Similarly, the Oregon Supreme Court recently disavowed the moral evidence language in its former instruction—"We agree that the phrase 'moral evidence' is archaic and obscure, and we disapprove of its use," *State v. Williams*, 828 P.2d 1006, 1019 (Ore. 1992). In fact, the phrase is archaic, but has evolved into a current meaning at odds with its meaning when originally incorporated into reasonable doubt instructions.[23]

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[23] Finally, the shift of focus from evidence to emotions, from facts to feelings, caused by the repeated use of the modifier "moral"

IV. PETITIONER WAS DEPRIVED OF DUE PROCESS BY THE DEFECTIVE REASONABLE DOUBT INSTRUCTION.

A. The Test for Determining Whether Jury Instructions Violate Constitutional Rights.

The test for determining constitutional error from a defective jury instruction is " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, 502 U.S. ——, 116 L.Ed. 2d 385, 399 (1991), quoting from *Boyde v. California*, 494 U.S. 370, 380 (1990). *Boyde* explained that to meet this test, "a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction." 494 U.S. at 380. The "reasonable likelihood" standard was chosen to make clear that appellate reversal is not required when "there is only a possibility of such an inhibition". *Id.* The necessary showing is greater than a *possibility* but less than an actual *probability*; when a guilty verdict appears with competing likelihood to rest either on a "proper basis" or on "an unconstitutional ground," this Court "decline[s] to choose between two such likely possibilities." *Id.*, quoting from *Bachellar v. Maryland*, 397 U.S. 564 (1970).

In this analysis, "the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Estelle v. McGuire*, 116 L.Ed. 2d at 399, quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). The factors to be considered include the challenged instruction itself, "the instructions as a whole," *McGuire* at 399;

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is compounded by the current connotations of the primary verb "feel" in the instruction, i.e., whether jurors "feel an abiding conviction to a moral certainty." In this era of pervasive self-awareness and self-improvement programs, people are encouraged, if not entitled, to express their feelings, and to rely on their feelings, with diminished accountability to objective facts, nowhere more so than in California. The verb "feel" would be very unlikely to appear in a jury instruction drafted today.

the "trial record," *id.*; the closeness of the evidence, *McGuire* at 404 (O'Connor, J., concurring and dissenting); the arguments of counsel, *Boyde* at 384-385; and the length of jury deliberations, *McGuire* at 403-404 (O'Connor, J., concurring and dissenting).

Moreover, it is eminently apparent from this Court's decision in *Sullivan v. Louisiana*, —— U.S. ——, 124 L.Ed.2d 182, 199 (1993) that some instructional errors pose a far more serious threat to the integrity of the proceedings than others. Where, as here, the challenged instruction threatens to undermine the fundamental guarantees of both due process and a jury trial, *Sullivan* at 198, the determination of what is a reasonable likelihood that the instruction was applied in an unconstitutional manner must take account of the gravity of this risk. For all of the reasons persuasively stated in *Sullivan*, a jury verdict following a misleading instruction on the standard of proof beyond a reasonable doubt cannot be salvaged by appellate weighing of the evidence presented to the jury. Rather, the focus of inquiry regarding a dubious reasonable doubt instruction must be more its likely impact on the jury's deliberations than the strength or weakness of the evidence that the jury was deliberating about. If a textual analysis of the challenged instruction demonstrates a reasonable likelihood that the jury misunderstood the concept of proof beyond a reasonable doubt, as it did in *Cage*, then further analysis is improvident—"There is no *object*, so to speak, upon which harmless error scrutiny can operate." *Sullivan* at 190 (emphasis in original). Only if such textual analysis does not establish the requisite reasonable likelihood is resort to the remaining tools of the *Boyde/McGuire* analysis necessary.

In sum, review of a constitutionally challenged jury instruction must consider both how likely it is that the jury was misled *and* how serious are the consequences of the jury being misled in terms of the fundamental fairness of the proceedings. In light of this Court's uncom-

promising stand regarding harmless error analysis in *Sullivan*, review of the challenged instruction in this case must reflect the unique importance of the reasonable doubt instruction in assuring a fair trial.[24]

B. Application of the Test to This Case.

1. *The likelihood of misapplication as indicated by textual analysis.*

a. *The manifest defects in the instruction.*

As set forth in part III, the California instruction contains a unique combination of mutually compounding defects which understate the necessary degree of certainty for conviction, overstate the degree of doubt necessary to acquit, and invite the jury to rely on impermissible matters of moral disapprobation and individual feelings apart from the evidence in reaching a verdict. The instruction consists of a passage extracted from *Commonwealth v. Webster*, each component of which conveys an improper meaning to the jury in current parlance. While the passage—at the time it was penned—conveyed a meaning consistent with the core concept of proof beyond a reasonable doubt,[25] the meaning presently conveyed is a gross deviation from that core concept.[26] Given the

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[24] It appears that this Court made just such a calibration in *Cage*, determining "how reasonable jurors could have understood the charge as a whole," 498 U.S. at 41, even though *Boyde v. California* had previously established the "reasonable likelihood" of misapplication standard for review of instructional error generally, 494 U.S. at 380.

[25] See Shapiro, *supra*, at 192.

[26] Shapiro at 193—"there is little doubt that 'moral certainty' no longer conveys these . . . ideas." Professor Shapiro suggested a possible (and by no means prescriptive) version of the *Webster* charge rendered in current idiomatic English:

> We can be absolutely certain that two plus two equals four. In the real world of human actions we can never be absolutely certain of anything. When we say that the prosecution must prove the defendant's guilt beyond a reasonable doubt, we do not mean that you, the jury, must be absolutely certain of the defendant's guilt before finding the defendant guilty. Instead, we mean you should not find the defendant guilty unless you have reached the highest level of certainty of the defendant's guilt that is possible to have about things that happen in the real world and that you must learn about by evidence presented in the courtroom. *Id.*

It would defy common sense to assert that the instruction given in this case conveys even a remote approximation of this core concept.

contemporary lexicography of the phrase "moral certainty," the current uses of "moral certainty" and "moral evidence," and the other compounding aspects of the instruction, it is more than reasonably likely that the jury understood the instruction as setting the degree of certainty necessary to convict at the level of probability rather than utmost certainty, and as inviting the jury to rely upon its moral response to petitioner and his conduct in reaching that degree of certainty.

b. *The absence of countervailing or corrective language.*

The instruction in this case consists primarily if not solely of defective components; it is not as if the challenged portions are merely intermittent sour notes in an otherwise harmonious rendition of the reasonable doubt concept. Petitioner juxtaposes the instruction in this case to both the original reasonable doubt discussion in *Webster* and the reasonable doubt instruction in *Cage* to emphasize that the instruction here lacks any of the redeeming features found in both of those.

The *Webster* discussion contains clear language, not in the instruction here, *prohibiting* conviction if the evidence shows only a strong probability of guilt, and instead requiring stronger proof:

> For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be

> true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty . . . . *Commonwealth v. Webster*, 59 Mass. at 119-120.

That language clearly informs the jury that the requisite degree of certainty is *higher* than a strong probability. The instruction condemned in *Cage* had a similar passage —"[e]ven where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused," 498 U.S. at 40. In contrast, the only guidance in the instruction here is the moral certainty language, which presently conveys the notion only of a probability, *not* the higher degree of certainty conveyed in *Webster* and *Cage*. If the instruction here contained language similar to that in *Webster* and *Cage*, it might have at least neutralized the mere probability meaning of moral certainty in contemporary parlance, but the instruction lacks any such corrective.

Next, the instruction condemned in *Cage* also contains language bracketing the reasonable doubt standard from the other direction. After negating *probability* as a basis for conviction, the *Cage* instruction continued—"What is required is not an absolute or mathematical certainty, but a moral certainty." 498 U.S. at 40. That language suggests to a jury that proof beyond a reasonable doubt requires a degree of certainty residing somewhere between probability and complete certainty, a better bracketing of the core concept of "utmost certainty" than can be gleaned from any plausible reading of the instruction in the present case.[27] The instruction here has no potentially redeeming

[27] Other instructions have been found constitutionally defective even though containing ameliorative aspects absent from the instruction here, e.g., *Morley v. Stenberg*, 828 F. Supp. at 1424, noting that "portions of the challenged instruction are unobjectionable," and referring to the *Holland* "hesitate to act" language and the contrast of proof beyond a reasonable doubt with "absolute or mathematical certainty."

language, and reduces itself to primary reliance on the phrase "moral certainty," accompanied by other misleading and diluting phraseology such as the use of "moral evidence" and the use of the untethered verb "feel" rather than a more anchored verb, e.g., "believe" or "are convinced."

2. *The likelihood of misapplication as indicated by the record as a whole.*

The multiple defects in the instruction here were particularly likely to result in a deviation from the reasonable doubt standard in light of the record as a whole. As set forth above, the tools of analysis require reference to matters including the closeness of the case, the arguments of counsel, and the length of jury deliberations.

Viewing the case as a whole, the prosecution presented strong evidence of petitioner's involvement in the October 13 Belvedere Park shootings (although the degree of culpability was vigorously contested), and weak evidence of petitioner's involvement in the October 31 Wells shootings.[28] It took the jury two days to return a verdict on the Belvedere Park case. Once the jury had found petitioner guilty as to those counts, they turned their attention to the much more difficult question of his guilt on the October 31st shootings of Ray and Marlene Wells. The prosecution's evidence was scanty at best, consisting of a generic identification of a male Hispanic seen in the vicinity of the Wells house at the time of the shooting, and the bargained-for testimony of a heroin addict and dedicated felon as to a purported post-offense admission by petitioner. At the time the jurors turned to the Wells counts, they had necessarily determined in the course of reaching the Belvedere Park verdicts that petitioner was a pistol-packing, prototypical gang member, an image redo-

[28] The trial court recognized this disparity in the prosecution's proof early in the case, characterizing the Wells proof as thin. RT 12/9/85, pp. 45A-46A.

lent of the uncontrollable violence ravaging the inner cities of California. The prosecutor had earlier made a specific effort to conjure up just that image, urging the jury in argument to see through the asserted veneer of petitioner's courtroom appearance and to instead imagine him with a mean-looking mustache and slicked-back hair, i.e., a stereotype of a Hispanic street "thug."[29] Moreover, the prosecutor made general efforts to preempt the moral high ground in the case, repeatedly attacking both petitioner and defense counsel throughout his argument. For example, after defense counsel had at one point objected to the admission of an autopsy photograph of Marlene Wells, unclothed, as irrelevant and prejudicial, the prosecutor worked this into his closing argument as follows: "She [Marlene Wells] sees *this heathen here* execute her husband and his [sic] trying to get out of there. She [defense counsel] wants to know why we show, they showed areas of pubic hair on this girl. *It's disgusting.*" RT 5619 (emphasis supplied). The prosecutor's characterization of petitioner as a "heathen," a derogatory term meaning "infidel" or "barbarian," and his manifestation of disgust at the defense,[30] clearly conveyed the mantle of

[29] The prosecutor argued:

> Today, she [defense counsel] said the defendant is clean cut. He has no mustache. He is wearing glasses. He is in a suit. He is dressed up.
>
> Now I am telling you again *this is just a ploy. You take a thug like this. He had a mustache, no glasses, a different hairstyle out there on the street,* give him a haircut, shave his mustache, put a set of glasses on his face, dress him up in a suit and you think he is a lawyer sitting over there. The people that have known him for years, they are looking over at this guy and they are saying, "I don't know that guy. I have never seen him look like that." RT 5237 (emphasis supplied).

[30] The prosecutor's argument was riddled with attacks on petitioner and defense counsel. The prosecutor trashed the defense as "an intentional fraud being perpetrated on the court," RT 5312-5313, expressed his personal revulsion, and showered shame onto the defense: "Every time I think about this nonsense, it's a shame that I got to spend all this time trying to get you to know it," RT 5331; "[]t]hat makes me sick everytime [sic] I think about that nonsense," RT 5573. See Appellant's Opening Brief, argument IX, pp. 105-130.

moral righteousness assumed by the prosecutor.[31]

The prosecutor repeatedly described the defense in terms of a tasteless story about adultery, in which a suspicious husband named Charlie finds his best friend Tom *in flagrante delicto* with his wife, RT 5246, an immorality tale wholly unrelated to any factual basis in this case. Nonetheless, the prosecutor repeatedly characterized the defense as standing in the place of the adulterous friend casting around for an explanation of his immoral conduct.[32]

Against this backdrop, the jury deliberated on the Wells counts. The length of deliberations on those counts, compared to the Belvedere Park counts, overwhelmingly demonstrates that the jury was in no way bowled over by the prosecution's *evidence*. The jury's questions during the Wells deliberations confirm that they were struggling with the evidence. Under these circumstances there is a very strong probability that the jury reached a verdict of accommodation in apparent accord with the reasonable

[31] The prosecutor's moral righteousness carried through guilt phase and into penalty phase as well, where he argued to the jurors that they would be "doing God's work" if they imposed the death penalty; that the imposition of the death penalty would provide for petitioner the positive opportunity to "get his soul right"; and that the Bible (Romans 13:1-7, recited to the jury) required the imposition of the death penalty in this case. RT 6539-6540. See *People v. Sandoval*, 4 Cal.4th at 192-193.

[32] "That's what this defense reminds me of. You have got to say something. Tom had nothing he could say. Standing there half-clothed, the wife, in his condition, the car out front, and that's the only thing he could come up with.

And I'm going to point out to you examples of where that's happened in this case." RT 5247.

doubt instruction given in this case, but in actual violation of the standard of proof beyond a reasonable doubt. The jury may well have resolved the problems and shortcomings of the prosecutor's evidence by recourse to the current understandings of the terms moral evidence and moral certainty, all of which would have redounded to petitioner's detriment. The prosecutor having branded petitioner as, inter alia, a heathen, and having analogized the defense to a brazen adulterer caught in the act, the jury would view the "moral evidence" as pointing to petitioner's guilt. With "moral certainty" connoting only a probability of guilt, a personal persuasion going beyond the factual evidence, or both, the jury likely followed the instructions to the best of their ability and returned guilty verdicts in volation of the guarantees of the Fifth and Sixth Amendments. In light of the closeness of the case,[33] petitioner's convictions, particularly the Wells counts, must be reversed.

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[33] Federal constitutional jurisprudence has long recognized that the closeness of the evidence weighs heavily in favor of reversal where a constitutional error has occurred. *Strickland v. Washington*, 466 U.S. 668, 673 (1984) ("a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"); *Drake v. Kemp*, 762 F.2d 1449, 1461 (11th Cir. 1985) (issuing habeas relief where "the jury deliberated at length before finding Drake guilty"); *Brooks v. Kemp*, 762 F.2d 1397, 1402, n.27 (11th Cir. 1985) ("it is appropriate . . . to consider weakness in the evidence of guilt since an important aspect of the jurisprudence is to minimize the risk that an innocent person will be executed"); *Newlon v. Armontrout*, 885 F.2d 1328, 1337-1338 (8th Cir. 1989) (length of jury deliberations one factor in finding prejudice); *United States v. Duncan*, 850 F.2d 1104, 1113-1114 (6th Cir. 1988) (reversing conviction because of confusing jury instruction based in part on length of jury deliberations).

V. THE WANING OF THE MORAL CERTAINTY LANGUAGE IN AMERICAN JURISPRUDENCE.

The overwhelming number of state and federal jurisdictions have long since discarded the moral certainty and moral evidence language in their reasonable doubt instructions. Appendix A, Survey of Current Usage of Moral Certainty Language in Reasonable Doubt Instructions, identifies the instructional practices in each state, showing only five jurisdictions which currently approve moral certainty language—California, Idaho, Massachusetts, North Dakota, and Tennessee. Massachusetts cleaves to its *Webster* charge notwithstanding mounting criticism from the federal courts. See, e.g., *Lanigan v. Maloney*, 853 F.2d 40; *Smith v. Butler*, 696 F.Supp. 748, 753 (D. Mass. 1988) ("Despite longstanding, continuing and current dissatisfaction by the First Circuit with the moral certainty formulations, . . . the Massachusetts state courts have shown no disposition to abandon its use"). The Supreme Courts of North Dakota and Tennessee have not addressed their respective instructions since *Cage v. Louisiana* was decided. It is clear that the moral certainty terminology is a vestigial relic well on its way to a long overdue retirement.

Appendix B, currently Approved Reasouable Doubt Instructions, sets out the text of currently approved jury instructions in each state. Most of these provide unobjectionable renditions of the core concept of proof beyond a reasonable doubt. They demonstrate both the breadth of the adherence to that concept across the nation and the wide variety of ways in which it can be expressed consistently with the Fifth and Sixth Amendments. The instruction in this case, with its reliance on moral certainty and moral evidence terminology, is beyond the pale. Petitioner's trial was tainted by an instruction both far out of alignment with mainstream jurisprudence and violative of the Constitution.

CONCLUSION

Wherefore, for the foregoing reasons, petitioner respectfully requests that this Court reverse the judgment of the Supreme Court of California.

Respectfully submitted,

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APPENDICES

APPENDIX A

SURVEY OF CURRENT USAGE OF MORAL CERTAINTY LANGUAGE IN REASONABLE DOUBT INSTRUCTIONS

I. States Currently Using "Moral Certainty" Language

State	Instruction Practice	Comments
California	Pattern Instruction CALJIC 2.90	Includes both moral evidence and moral certainty language
Idaho	No pattern instruction	Case law approves instruction tracking *Webster* language—*State v. Rhoades*, 822 P.2d 960 (1991); *State v. Hoffman*, 851 P.2d 934 (1993)
Massachusetts	Pattern Instruction 2.05 ("*Webster* Charge" (modern syntax)	"Moral evidence" deleted from the "Modern Syntax" version of the *Webster* instruction
North Dakota	Pattern Instruction 2002	There is no reported decision of the North Dakota Supreme Court evaluating this instruction in light of *Cage v. Louisiana*
Tennessee	Pattern Instruction Crim. 2.03	There is no reported decision of the Tennessee Supreme Court evaluating this instruction in light of *Cage v. Louisiana*

II. States Not Currently Using "Moral Certainty" Language

Alabama	Recommended Judicial College Instruction
Alaska	Pattern Instruction, APJI (Crim. 1.52) (1987 ed.)

State	Instruction Practice	Comments
Arizona	Pattern Instruction	Case law recommends against an explanatory instruction and condemns "mere possible doubt" language—*State v. Chavarria*, 1993 Westlaw 313.70 [Ariz. App. 1993]
Arkansas	Pattern Instruction, AMCI 110	
Colorado	C.J.I. 3.04	"Hesitate to act" language
Connecticut	No pattern instruction	Various instructions approved in caselaw: *State v. Gomez*, 672 A.2d 1014 (Conn. 1993) ("hesitate to act" language); *State v. Dixon*, 611 A.2d 432 (Conn. App. 1992)
Delaware	"Reason and common sense" language	
Florida	Pattern Instruction No. 2.03	*Woods v. State*, 596 So.2d 156 (Fla. App. 1992) (upholding *Cage* challenge)
Georgia	Pattern Instruction	*Vance v. State*, 416 S.E.2d 516 (1993) (disapproving prior moral certainty language)
Hawaii	Pattern Instruction HSJI 3.02	
Illinois	Pattern Instruction 2.03; no explanation of reasonable doubt	
Indiana	Pattern Jury Instruction IPJI (Crim. 11.01)	*Bell v. State*, 610 N.E.2d 229 (Ind. 1993)

State	Instruction Practice	Comments
Iowa	Pattern Instruction UI 501.11—"hesitancy to act" language	Approved in *State v. McGranahan*, 206 N.W.2d 88 (Ia. 1973)
Kansas	Case Law prohibits definition or explanation	*State v. Mack*, 612 P.2d 158 (Kan. 1980)
Kentucky	Rules of Crim. Procedure prohibit definitions of reasonable doubt (Ky.R.Cr.9.56)	
Louisiana	No Pattern Instruction	
Maine	No Pattern Instruction	*State v. Pelletier*, 434 A.2d 52 (1981) (approves a language "doubt for which you can assign a reason")
Maryland	Pattern Instruction	
Michigan	Pattern Instruction CJI 2d 1.9	Recently abandoned moral certainty language; *People v. Sammons*, 478 N.W.2d 901 (Mich.App. 1991)
Minnesota	Pattern Instruction CJI 3.03	
Mississippi	Pattern Instruction MJI C.108-109	
Missouri	Statutory mandated instruction MRS 546.070(4) Pattern Instruction MAI Cr.3d 302.04	
Montana	Pattern Instruction Montana Crim. Instr. No. 1-1004	Upheld in *State v. Flesch*, 839 P.2d 1270 (Mont. 1992)
Nebraska	Pattern Instruction N.J.I. 2d Crim. 20	

State	Instruction Practice	Comments
Nevada	Statutory mandated instruction, NRS 175.211	Amended in 1991 to remove adjective "substantial" as modifying doubt necessary to acquit
New Hampshire	Case law prescribes single definition—"doubt based on reason"	*State v. Wentworth* 395 A.2d 858 (1978)
New Jersey	Pattern Instruction MJC 1.104	"Moral certainty" language abandoned in 1970's
New Mexico	Pattern Instruction UJI—Crim.14-5060—"hesitate to act" language	
New York	Pattern Instruction CJI 6.20	Case law reverses convictions where previous "moral certainty" language used—*People v. Frank*, 588 N.Y.S.2d 670 (1992)
North Carolina	Pattern Instruction N.C.P.I. Crim. 101.10	*State v. Bryant*, 432 S.E.2d 29 (N.C. 1993) reversed a conviction where reasonable doubt instruction employed pre-*Cage* "moral certainty" language
Ohio	Statutory mandated instruction—"willing to act" language—RC 2901.5(D)	"Moral evidence" reference in instruction
Oklahoma	Pattern Instruction OUJI CR.903	Case law prohibits further definitions—*Pannell v. State*, 640 P.2d 568, 570 (Okla. 1982)
Oregon	Pattern Jury U.Or.J.I. 1006—"willing to act" language	"Moral certainty" language removed in 1992

State	Instruction Practice	Comments
Pennsylvania	Pattern Instruction "hesitate to act" language	*Comm. v. Stokes*, 615 A.2d 704 (C.Pa. 1992)
Rhode Island	No Pattern Instruction	*State v. Desrusiers*, 559 A.2d 641 (R.I. 1989)
South Carolina	Pattern Instruction "hesitates to act" language	Case law specifically disapproved "moral certainty" language—*State v. Manning*, 409 S.E.2d 372 (1991)
South Dakota	Pattern Instruction SDPI 1-6-1	
Texas	Judicially mandated instruction—"hesitate to act" language	*Geesa v. State*, 820 S.W.2d 154 (Tex.Cr. App. 1991)
Utah		
Vermont	No Pattern Instruction	*State v. Francis*, 561 A.2d 392 (1989) (definition not required)
Virginia	Pattern Instruction 2.100	Case law discourages explanations—*Cooper v. Comm.*, 345 S.E.2d 775 (Va.App. 1986)
Washington	Pattern Instruction WPIC 4.01	
West Virginia	No Pattern Instruction	Case Law discourages explanations—*State v. Beckett*, 310 S.E.2d 883 (1983)
Wisconsin	Pattern Instruction WIS JI Crim.140 ("doubt for which a reason can be given")	
Wyoming	Case law prohibits definition or explanation	*Collins v. State*, 854 P.2d 688 (Wyo. 1993)
District of Columbia	Pattern Instruction "Abiding conviction" language (D.C. C.J.I. 2.09)	

APPENDIX B

CURRENTLY APPROVED REASONABLE DOUBT INSTRUCTIONS

ALABAMA

Currently approved instruction:

> Now, in this case, the burden of proving that the defendant is guilty as charged rests upon the State and before a conviction can be had in this case, the State must satisfy each and every member of the jury of the defendant's guilt and unless the State satisfies you of the defendant's guilt beyond a reasonable doubt then he is entitled to an acquittal.
>
> The phrase "reasonable doubt" is self-explanatory. Efforts to define it do not always clarify the term, but it may help you some to say that the doubt which would justify an acquittal must be an actual and substantial doubt, and not a mere guess or surmise and it is not a forced or captious doubt. If, after considering all of the evidence in the case, you have an abiding conviction of the truth of the charge, then you are convinced beyond a reasonable doubt, and it would be your duty to convict the defendant. The reasonable doubt which entitles an accused to an acquittal is not a mere fanciful vague, conjectural or speculative doubt, but a reasonably substantial doubt, arising from all or part of the evidence or from the lack of evidence and remaining after a careful consideration of the testimony, such as reasonable, fair-minded and conscientious men would entertain under all the circumstances. Now, you will observe, gentlemen, that the State is not required to convince you of the defendant's guilt beyond all doubt, but simply beyond all reasonable doubt. If, after comparing and considering all the evidence in this case, your minds are left in such a condition that you can not say you have an abiding

conviction of the defendant's guilt, then you are not convinced beyond a reasonable doubt, and the defendant would be entitled to an acquittal. (Alabama Judicial College, recommended instruction, commonly used.)

Case law:

Ex Parte Williams, 93 Westlaw 16380 (Ala.1993) (addressing a supeseded reasonable doubt instruction, the Court states that reasonable doubt and moral certainty are "not exactly synonymous," and holds that an instruction equating them and defining doubt as "an actual substantial doubt" may be error, but is harmless, noting that the instruction did not use the "grave uncertainty" language condemned in *Cage*).

ALASKA

Currently approved instruction:

Presumption of Innocence, Burden of Proof Beyond a Reasonable Doubt

The distinguishing features of a criminal trial are what are known in the language of the law as the presumption of innocence and the burden of proof beyond a reasonable doubt. The law presumes a defendant to be innocent of crime. Thus, a defendant, although accused, begins the trial with a clean slate—with no evidence favoring conviction. The presumption of innocence alone is sufficient to acquit a defendant, unless you are satisfied beyond a reasonable doubt of the defendant's guilt, after careful and impartial consideration of all the evidence in the case.

This last-mentioned requirement, that you be satisfied beyond a reasonable doubt of defendant's

guilt, is what is called the burden of proof. It is not required that the prosecution prove guilt beyond all possible doubt, for it is rarely possible to prove anything to an absolute certainty. Rather, the test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense. Proof beyond a reasonable doubt must be proof of such a convincing character that, after consideration, you would be willing to rely and act upon it without hesitation in your important affairs. A defendant is never to be convicted on mere suspicion or conjecture.

The burden of proving the defendant guilty beyond a reasonable doubt always rests upon the prosecution. This burden never shifts throughout the trial, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. A defendant has the absolute right not to testify, and you must not draw any inference against the defendant for not testifying. Thus a reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove every essential element of the crime charged, beyond a reasonable doubt, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution.

Alaska Pattern Jury Instruction (Crim.1.52)

Case law:

McCurry v. State, 538 P.2d 100 (Alaska 1975); *Davenport v. State*, 519 P.2d 452 (Alaska 1974).

ARIZONA

Currently approved instruction:

> OPTIONAL: "The term reasonable doubt means doubt based upon reason. This does not mean imaginary or possible doubt. It is a doubt which may arise in your minds after a careful and impartial consideration of all the evidence or from the lack of evidence." (Recomended Arizona Jury Instruction Standard Criminal 5 (1989)—but majority of Drafting Committee believes a definition is "ineffective."

Case law:

> *State v. Duzan*, 93 WL 106788 (Ariz.App. 1993) [rejecting due process violation claim because above instruction excluded a "possible doubt" noting that the *Cage* instruction was "markedly different," recommends against explanatory instruction].
>
> *State v. Chavarria*, 93 WL 31370 (Ariz.App.1993) [condemns portion of instruction stating that reasonable doubt it not mere possible doubt].

ARKANSAS

Currently approved instruction:

> Reasonable doubt is not a mere possible or imaginary doubt. It is a doubt that arises from your consideration of the evidence and one that would cause a careful person to pause and hesitate in the graver transactions of life. A juror is satisfied beyond a reasonable doubt if after an impartial consideration of all the evidence he or she has an abiding conviction of the truth of the charge. (AMCI 110)

CALIFORNIA

Currently approved instruction:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. (CALJIC 2.90)

Case law:

> *People v. Sandoval*, 4 Cal.4th 155 (Cal. 1992) [approving above instructions]

COLORADO

Currently approved instruction:

> Reasonable doubt means a doubt based upon reason and common sense which arises from a fair and rational consideration of all of the evidence, or the lack of evidence, in the case. It is a doubt which is not a vague, speculative or imaginary doubt, but such a doubt as would cause reasonable people to hesitate to act in matters of importance to themselves.
>
> If you find from the evidence that each and every element has been proven beyond a reasonable doubt, you will find the defendant guilty. If you find from the evidence that the prosecution has failed to prove

any one or more of the elements beyond a reasonable doubt you will find the defendant not guilty. (COLJI 3.04)

CONNECTICUT

Currently approved instruction:

A reasonable doubt is . . . that would cause you as reasonable men and women to hesitate to act . . . weight and important matters . . . your own affairs. (*Gomez*)

This phrase, reasonable doubt, has no technical nor unusual meaning. You get the real meaning of the phrase if you emphasize the word reasonable. A reasonable doubt is a doubt for which a valid reason can be assigned. It is a doubt that is something more than a guess or a surmise. A reasonable doubt is not such a doubt as is raised by one who questions simply for the sake of argument. It is not a doubt suggested by the ingenuity of counsel which is not warranted by the evidence. A reasonable doubt is a real doubt, an honest doubt, a doubt which has its foundation in the evidence [or absence thereof] . . . and not a whimsical or captious doubt, but a substantial doubt, and again, it must rest upon some element of weakness in the proof that gives you [] a reason for doubting guilt. . . . If there is no reasonable ground for doubting guilt, then it is made out beyond a reasonable doubt . . . not an imaginary doubt, but a doubt raised upon reason and common sense. (*Dizon*)

Case law:

State v. Gomez, 622 A.2d 1014 (Conn. 1993) [upholding "hesitate to act" instruction above, as similar to jury instructions previously approved by the court, and which contains none of the *Cage* language].

State v. Dizon, 611 A.2d 432 (Conn.App. 1992) [refusing to find the instruction as a whole defective

because of single phrase "a substantial doubt" and concluding that the *Cage* error was "the cumulative effect of three offending terms that hopelessly polluted the trial court's reasonable doubt instructions"].

DELAWARE

Currently approved instruction:

The law presumes every person charged with a crime to be innocent. This presumption of innocence requires a verdict of not guilty unless you are convinced by the evidence that the defendant is guilty beyond a reasonable doubt. The burden is upon the State to prove all of the facts necessary to establish the crime charged beyond a reasonable doubt. Reasonable doubt is a practical standard.

On the one hand, in criminal cases, the law imposes a greater burden of proof than in civil cases. Proof that a defendant is probably guilty is not sufficient. On the other hand, the law recognizes that certainty is rarely possible in matters involving human behavior. The State is, therefore, not required to prove guilt to a certainty. Reasonable doubt is a doubt based on reason and common sense. It is the kind of doubt that a fair and reasonable juror would have after carefully considering the evidence. If you have a reasonable doubt of the defendant's guilt, you must return a verdict of not guilty.

Case law:

Zimmerman v. State, 191 Del.Super., Lexis 3441 (Del. Super.1991)

FLORIDA

Currently approved instruction:

The defendant has entered a plea of not guilty. This means you must presume or believe the defend-

ant is innocent. The presumption stays with the defendant as to each material allegation in the [information] [indictment] through each stage of the trial until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

To overcome the defendant's presumption of innocence the State has the burden of proving the following two elements:

1. The crime with which the defendant is charged was committed.
2. The defendant is the person who committed the crime. The defendant is not required to prove anything.

Whenever the words "reasonable doubt" are used you must consider the following:

A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.

It is to the evidence introduced upon this trial, and to it alone, that you are to look for that proof.

A reasonable doubt as to the guilt of the defendant may arise from the evidence, conflict in the evidence or the lack of evidence.

If you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable

doubt, you should find the defendant guilty. (Pattern Instruction No. 2.03)

Case law:

Woods v. State, 596 So.2d 156 (Fla.App.1992) [upholding the above instruction over a *Cage* challenge].

GEORGIA

Currently approved instruction:

D. Presumption of Innocence: Burden of Proof; Reasonable Doubt

This defendant is presumed to be innocent until proven guilty. The defendant enters upon the trial of the case with a presumption of innocence in his/her favor. This presumption remains with the defendant until it is overcome by the state with evidence which is sufficient to convince you beyond a reasonable doubt that the defendant is guilty of the offense charged.

No person shall be convicted of any crime unless and until each element of the crime is proven beyond a reasonable doubt.

The burden of proof rests upon the state to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt.

There is no burden of proof upon the defendant whatever, and the burden never shifts to the defendant to prove innocence.

However, the state is not required to prove the guilt of the accused beyond all doubt or to a mathematical certainty. A reasonable doubt means just what it says. It is a doubt of a fair-minded, impartial juror, honestly seeking the truth. It is a

doubt based upon common sense and reason. It does not mean a vague or arbitrary doubt, but is a doubt for which a reason can be given, arising from a consideration of the evidence, a lack of evidence, a conflict in the evidence, or any combination of these.

If after giving consideration to all the facts and circumstances of this case, your minds are wavering, unsettled or unsatisfied, then that is a doubt of the law, and you should acquit the defendant; but, if that doubt does not exist in your minds as to the guilt of the accused, then you would be authorized to convict the defendant.

If the state fails to prove the defendant's guilt beyond a reasonable doubt, it would be your duty to acquit the defendant.

Case law:

Vance v. State, 416 S.E.2d 516 (Ga. 1993) ["moral certainty" language of superseded instruction not reversible error but "better practice is not to use it"; see fn. 5 stating that " 'moral and reasonable certainty' " language is unnecessary, unhelpful, and possibly misleading: "What is perceived as 'moral' may differ from group to group, from class to class, and from individual to individual. This diversity renders any precise definition of 'moral certainty' elusive, and any uniformity of interpretation by jurors unlikely"].

HAWAII

Currently approved instruction:

Presumption of Innocence; Reasonable Doubt

You must presume the defendant is innocent of the charge against him her. This presumption remains with the defendant throughout the trial of the case, unless and until the prosecution proves the defendant guilty beyond a reasonable doubt.

The presumption of innocence is not a mere slogan but an essential part of the law that is binding upon you. It places upon the prosecution the duty or proving every material element of the offense charged against the defendant beyond a reasonable doubt.

You must not find the defendant guilty upon mere suspicion or upon evidence which only shows that the defendant is probably guilty. What the law requires before the defendant can be found guilty is not suspicion, not probabilities, but proof of the defendant's guilt beyond a reasonable doubt.

What is a reasonable doubt?

It is a doubt in your mind about the defendant's guilt which arises from the evidence presented or from the lack of evidence and which is based upon reason and common sense.

Each of you must decide, individually, whether there is or is not such a doubt in your mind after careful and impartial consideration of the evidence.

Be mindful, however, that a doubt which has no basis in the evidence presented, or the lack of evidence, or reasonable inferences therefrom, or a doubt which is based upon imagination, suspicion or mere speculation or guesswork is not a reasonable doubt.

What is proof beyond a reasonable doubt?

If, after consideration of the evidence and the law, you do not have a reasonable doubt of the defendant's guilt, then the prosecution has proved the defendant's guilt beyond a reasonable doubt and it is your duty to find the defendant guilty. (HSJI 3.02)

IDAHO

Currently approved instruction:

> A reasonable doubt is a doubt based upon evidence or lack of evidence and upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs. . . . If after going over in your minds the entire case, you have an abiding conviction, to a moral certainty, of the truth of the charge, then you are convinced beyond a reasonable doubt. . . .

Case law:

State v. Pratt, 1993 WL 27731 (Idaho 1993) [upholding an instruction similar to CALJIC 2.90, but expanded to include "a reasonable doubt [] leaves your minds in a condition that you do not feel an abiding faith amounting to a moral certainty that the defendant is guilty" and "to convict . . . does require guilt to be established to your satisfaction to a moral certainty, and that is a certainty that convinces and directs your understanding and satisfies your reason and judgment of the truth" because "as in *Rhoades* the reasonable doubt instruction [] is not similar to [the one] in *Cage*"].

State v. Rhoades, 822 P.2d 960 (Idaho 1991) [holding that "the only appropriate instruction on reasonable doubt is the California jury instruction"].

State v. Hoffman, 851 P.2d 934 (Idaho 1993) (upholding above above instruction because it is "substantially the same" as that in *Rhoades* and did not use the "grave uncertainty" language].

ILLINOIS

Currently approved instruction:

> [(The) (Each)] defendant is presumed to be innocent of the charge(s) against him. This presumption remains with [(him) (each defendant)] throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from all the evidence in this case you are convinced beyond a reasonable doubt that he is guilty.
>
> The State has the burden of proving the guilt of [(the) (each)] defendant beyond a reasonable doubt, and this burden remains with the State throughout the case. [(The) (A)] defendant is not required to prove his innocence. (Illinois Pattern Jury Instructions in Criminal Cases No. 203)

Case law:

> The Illinois Supreme Court Committee on Pattern Jury Instructions recommends that no instruction be given defining the term "reasonable doubt." They quote the Illinois Supreme Court as stating that "Reasonable doubt is a term which needs no elaboration and we have so frequently discussed the futility of attempting to define it that we might expect the practice to be discontinued." *People v. Malmenato,* 14 Ill.2d. 52, 61, 150 N.E.2d 806, 811 (1958).

INDIANA

Currently approved instruction:

> A reasonable doubt is a fair, actual and logical doubt that arises in your mind after an impartial consideration of all of the evidence and circumstances in the case. It should be a doubt based upon reason and common sense and not a doubt based upon imagination or speculation. ¶ If, after consid-

ering all of the evidence, you have reached a firm belief in the guilt of the Defendant that you feel safe to act upon that belief, without hesitation, in a matter of the highest concern and importance to you, then you will have reached that degree of certainty which excludes reasonable doubt and authorizes conviction. (Indiana Pattern Jury Instructions (Criminal) 11.01)

Case law:

Bell v. State, 610 N.E.2d 229 (Ind. 1993) [upholding above instruction on challenge to words "fair" and "actual" because those words are further defined by the use of the language " 'doubt based on reason and common sense and not upon imagination or speculation' "; and rejecting further defense argument that the "firm belief, without hesitation" language is the equivalent of the "moral certainty" language found defective in *Cage*].

IOWA

Currently Approved Instruction:

The burden is on the State to prove the defendant guilty beyond a reasonable doubt.

A "reasonable doubt" is such a doubt as fairly and naturally arises in your mind and by reason of which you cannot say that you have a full and abiding conviction of the guilt of the defendant; and if, after considering all of the circumstances as disclosed by the evidence, you find your mind wavering or vacilating [sic], then you have a reasonable doubt, and the defendant is entitled to the benefit of such doubt and you must acquit him. A reasonab'e doubt may arise from the evidence in the case or it may arise from a lack or failure of evidence, and it must be such a

doubt as would cause a reasonable, prudent and considerate man to pause and hesitate before acting in the graver and more important affairs of life. But you should not ignore credible evidence to hunt for doubt, and you should not entertain such doubt as is purely imaginary or fanciful or based on groundless conjecture. If, after a careful and impartial consideration of all of the evidence in the case, you have a full and abiding conviction of the guilt of the defendant, then you are satisfied beyond a reasonable doubt, otherwise you are not satisfied beyond a reasonable doubt. (UI 501.11)

Case law:

State v. McGranahan, 206 N.W.2d 88 (Ia. 1973) [approving above instruction]

KANSAS

Currently Approved Instruction:

Kansas case law precludes definitions or explanations of reasonable doubt.

Case law:

State v. Mack, 612 P.2d 158 (Kan. 1980) [prohibiting definitions or explanations)

KENTUCKY

Currently Approved Instruction:

R.Cr. 9.56, "Reasonable Doubt" provides:

(1) In every case the jury shall be instructed substantially as follows: "The law presumes a defendant to be innocent of a crime, and the indictment (or other accusatory document) shall not be considered

as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty (and if you find him guilty but have a reasonable doubt as to the degree of the offense of which he is guilty, you shall find him guilty of the lower degree)."

(2) The instructions should not attempt to define the term "reasonable doubt."

LOUISIANA

Currently Approved Instruction:

No statewide pattern instruction.

Case law:

State v. Berniard, WL 302687 (La.App.1993) [in light of *Sullivan*, court reverses where *Cage* instruction given, even though defendant failed to object]).

State v. Harrison, 609 So.2d 789 (La. 1992) [where jury was instructed that a reasonable doubt was "such a doubt as would give rise to a grave uncertainty", the Court reversed; even though *Cage* went "beyond" this instruction by including moral certainty, and actual substantial doubt, the Supreme Court state that the word "grave" suggested a higher degree of doubt than required under reasonable doubt standard: the jury here might have had a reasonable doubt but not a grave uncertainty].

State v. Daniels, 614 So.2d 97 (La.App.1993) [upholding instruction similar to that in *Cage*, but without "moral certainty" language, because it was not the "same combination" of terms used in *Cage*].

State v. Smith, 600 So.2d 919 (La.App.1992) [upholding "actual or substantial doubt" instruction that did not contain the grave uncertainty or moral certainty language of *Cage*].

MAINE

Currently Approved Instruction:

No statewide pattern instructions.

Case law:

State v. Pelletier, 434 A.2d 52 (1981) [approving instruction and defines reasonable doubt in terms of "doubt for which you can assign a reason".]

MARYLAND

Currently Approved Instruction:

The State is not required to prove guilt beyond all possible doubt or to a mathematical certainty. A reasonable doubt is a doubt founded upon reason. It is not a fanciful doubt, a whimsical doubt or a capricious doubt. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief *without reservation* in an important matter in your own business or personal affairs. However, if you are not satisfied of the defendant's guilt to that extent, then reasonable doubt exists and the defendant must be found not guilty.

Case law:

Wills v. State, 620 A.2d 295 (Md.1993) [reversing conviction because of trial judge's extemporaneous reasonable doubt instruction emphasizing the connection necessary for life decisions].

MASSACHUSETTS

Currently approved instruction:

I. *Webster* Charge (Modern Syntax)

The burden is on the Commonwealth to prove beyond a reasonable doubt that the defendant is guilty of the charge(s) made against him (her).

What is proof beyond a reasonable doubt? The term is often used and probably pretty well understood, though it is not easily defined. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt, for everything in the lives of human beings is open to some possible or imaginary doubt. A charge is proved beyond a reasonable doubt if, after you have compared and considered all of the evidence, you have in your minds an abiding conviction, to a moral certainty, that the charge is true.

I have told you that every person is presumed to be innocent until he is proved guilty, and that the burden of proof is on the the prosecutor. If you evaluate all the evidence and you still have a reasonable doubt remaining, the defendant is entitled to the benefit of that doubt and must be acquitted.

It is not enough for the Commonwealth to establish a probability, even a strong probability, that the defendant is more likely to be guilty than not guilty. That is not enough. Instead, the evidence must convince you of the defendant's guilt to a reasonable and moral certainty; a certainty that convinces your understanding and satisfies your reason and judgment as jurors who are sworn to act conscientiously on the evidence.

This is what we mean by proof beyond a reasonable doubt.

II. Webster Charge (Verbatim)

The burden is on the Commonwealth to prove beyond a reasonable doubt that the defendant is guilty of the charge(s) made against him (her).

Then what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on [fallible] evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, or the truth of the charge.

The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in fact of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal.

For it is not sufficient to establish a probabilty, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt. . . ." (Mass. Model Jury Instructions 2.05 & 2.051 (1988 ed.))

Case law:

Com. v. Beldotti, 567 N.E.2d 1219 (Mass. 1991) [no error in using "moral certainty" language of the "standard charge," unless used "in isolation"; and

rejecting contention that trial court's freehand embellishments of the standard charge were defective, to wit, the judge's statement that "we are dealing with human beings . . . and human memory, so we do not require the government to prove its case beyond all doubt"].

MICHIGAN

Currently approved instruction:

(1) A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continued throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that [he/she] is guilty.

(2) Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove [his her] innocence or to do anything. [] If you find that the prosecutor has not prove every element beyond a reasonable doubt, then you must find the defendant not guilty.

(3) A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that—a doubt that is reasonable, after a careful and considered examination of the facts and circumstances of this case. (CJI2d 3.2)

Case law:

People v. Sammons, 498 N.W.2d 901 (Mich.App. 1991) [noting the recent deletion of moral certainty language from the pattern instruction]

The Commentary to the revised version above notes that the committee voted to abandon the phrase "moral certainty" because "the phrase 'mora! certainty' was ambiguous at best, particularly in a diverse and pluralistic society undergoing rapid change."

MINNESOTA

Currently approved instruction:

Proof beyond a reasonable doubt is such proof as ordinarily prudent men and women would act upon in the most important of their affairs. A reasonable doubt is a doubt based on common sense. It does not mean a fanciful or capricious doubt, nor does it mean beyond all possibility of doubt. (Crim. Jury Instruction 3.03)

MISSISSIPPI

Currently approved instruction:

The Court instructs the jury that you are bound, in deliberating upon this case, to give the defendant the benefit of any reasonable doubt of the defendant's guilt that arises out of the evidence or want of evidence in this case. There is always a reasonable doubt of the defendant's guilt when the evidence simply makes it probable that the defendant is guilty. Mere probability of guilt will never warrant you to convict the defendant. It is only when on the whole evidence you are able to say on your oaths, beyond a reasonable doubt, that the defendant is guilty that the law will permit you to find him/her guilty. You might be able to say that you believe him/her to be guilty, and yet, if you are not able to say on your oaths, beyond a reasonable doubt, that he/she is guilty, it is your sworn duty to find the defendant "Not Guilty." (Mississippi Jury Instruction C.108)

The masculine form as used in these instructions, if applicable as shown by the text of the instructions and the evidence, applies to a female person or a corporation.

The Court instructs the jury that a reasonable doubt may arise from the whole of the evidence, the conflict of the evidence, the lack of evidence, or the insufficiency of the evidence; but however it arises, if it arises, it is your sworn duty to find the defendant "Not Guilty." (Mississippi Jury Instruction C.109)

MISSOURI

Currently approved instruction:

The charge of any offense is not evidence, and it creates no inference that any offense was committed or that (the) (either) (any) defendant is guilty of an offense.

(The) (Each) defendant is presumed to be innocent, unless and until, during your deliberations upon your verdict, you find him guilty. This presumption of innocence places upon the state the burden of proving beyond a reasonable doubt that (the) (either) (any) defendant is guilty.

A reasonable doubt is doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. The law does not require proof that overcomes every possible doubt. If, after your consideration of all the evidence, you are firmly convinced that (a) (the) defendant is guilty of the crime charged, you will find him guilty. If you are not so convinced, you must give him the benefit of the doubt and find him not guilty. (MAI.Cr.3d 302.04)

Case law:

State v. O'Brien, 857 S.W.2d 212 (Mo. 1993) [upholding instruction against *Cage*-type challenge].

MONTANA

Currently approved instruction:

Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person would rely and act upon it in the most important of his or her own affairs. Beyond a reasonable doubt does not mean beyond any doubt or beyond a shadow of doubt. (Montana Criminal Instruction No. 1-004)

Case law:

State v. Flesch, 839 P.2d 1270 (Mont. 1992) [upholding above instruction as "considerably different" from that in *Cage;* Montana Court has held that "more complicated instructions on reasonable doubt did not help clarify the State's burden of proof, but rather had a tendency to confuse the jury"].

NEBRASKA

Currently approved instruction:

A reasonable doubt is one based upon reason and common sense after careful and impartial consideration of all the evidence. A reasonable doubt may arise from evidence adduced by either party or from a lack of evidence on the part of the State. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt. (NJI2d Crim. 2.0 (1992))

Case law:

State v. Gatson, 93 WL 373476 (Sept. 24, 1993) [upholding above instruction against challenge to the

last sentence, on the ground that *Cage* did not disapprove of the instruction in that case on the grounds of its "not a possible doubt" language].

NEVADA

Currently approved instruction:

A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation. (NRS 175.211)

NEW HAMPSHIRE

Currently approved instruction:

Under our constitutions, all defendants in criminal cases are presumed to be innocent until proven guilty beyond a reasonable doubt. The burden of proving guilt is entirely on the State. The defendant does not have to prove his innocence. The defendant enters this courtroom as an innocent person, and you must consider him to be an innocent person, and you must consider him to be innocent until the State convinces you beyond a reasonable doubt that he is guilty of every element of the alleged offense. If, after all the evidence and arguments, you have a reasonable doubt as to the defendant's having committed any one or more of the elements of the offense, then you must find him not guilty.

A "reasonable doubt" is just what the words would ordinarily imply. The use of the word reasonable means simply that the doubt must be reasonable rather than unreasonable; it must be a doubt based on reason. It is not a frivolous or fanciful doubt, nor is it one that can easily be explained away. Rather, it is such a doubt based upon reason as remains after consideration of all of the evidence that the State has offered against it. The test you must use is this: If you have a reasonable doubt as to whether the State has proved any one or more of the elements of the crime charged, you must find the defendant not guilty. However, if you find that the State has proved all of the elements of the offense charged beyond a reasonable doubt, you should find the defendant guilty.

Case law:

State v. Wentworth, 395 A.2d 858 (1978) [prescribing the above instruction "[t]o avoid needless litigation"].

NEW JERSEY

Currently approved instruction:

Model Jury Charge 1.104

NEW MEXICO

Currently approved instruction:

The law presumes the defendant to be innocent unless and until you are satisfied beyond a reasonable doubt of this guilt.

The burden is always on the state to prove guilt beyond a reasonable doubt. It is not required that the state prove guilt beyond all possible doubt. The

test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and comon sense—the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of his life. (UJI 14-5060)

NEW YORK

Currently approved instruction:

This completes my instructions on the constitutional safeguards of the presumption of innocence and the burden of proof.

I now discuss with you the constitutionally mandated standard of proof in all criminal cases, that of proof of guilt beyond a reasonable doubt.

The standard of proof required by law in every criminal case is proof of guilt beyond a reasonable doubt. That standard, however, does not require the People to prove the defendant guilty beyond all possibility of doubt or beyond a shadow of a doubt. It requires the People to establish the defendant's guilt beyond a *reasonable* doubt.

Our law, therefore, requires that before this jury may convict the defendant, each of you must be satisfied that the credible evidence is sufficient to convince you beyond a reasonable doubt that the defendant is in fact guilty.

The evidence must satisfy you beyond a reasonable doubt that the defendant is in fact the person who committed the crime(s) charged.

The evidence must also establish beyond a reasonable doubt each and every essential element of the crime(s) charged as I shall later define such elements.

What does the law mean when it requires proof of guilt "beyond a reasonable doubt?" When is a doubt of guilt a reasonable doubt under our law?

A doubt of the defendant's guilt, to be a reasonable doubt, must be a doubt for which some reason can be given. The doubt, to be reasonable, must therefore arise because of the nature and quality of the evidence in the case, or from the lack or insufficiency of the evidence in the case. The doubt, to be a reasonable doubt, should be one which a reasonable person acting in a matter of this importance would be likely to entertain because of the evidence or because of the lack or insufficiency of the evidence in the case.

A doubt of guilt is not *reasonable* if, instead of being based on the nature and quality of the evidence or insufficiency of the evidence, it is based on some guess or whim or speculation unrelated to the evidence in the case. Also, a doubt of guilt is not a *reasonable* doubt if it is based merely an sympathy for the defendant or from a mere desire by a juror to avoid a disagreeable duty.

I therefore repeat: A doubt of a defendant's guilt, to be a *reasonable* doubt, must arise either from the nature and quality of the evidence in the case, or from the lack or insufficiency of the evidence in the case.

Therefore, the first duty of each juror is to consider and weigh all the evidence in the case and decide which you believe is credible and worthy of your consideration.

The next duty of each juror is to determine whether the juror has, in fact, a reasonable doubt of the defendant's guilt as that term is defined in our law.

A "reasonable doubt," our law says, is an *actual* doubt, one which you are conscious of having in

your mind after you have considered all the evidence in the case. If, after doing so, you then feel *uncertain* and not fully convinced of the defendant's guilt, *and* you are also satisfied that in entertaining such a doubt you are acting as a reasonable person shou'd act in a matter of this importance, then that is a "reasonable doubt" of which the defendant is entitled to the benefit.

I repeat, it is the duty of each juror carefully to review, weigh and consider all the evidence in the case.

If, after doing so, you find that the People have not proved the defendant's guilt beyond a reasonable doubt, as I have defined that term to you, then you must find the defendant *not* guilty.

On the other hand, if you are satisfied that the People have proved the defendant's guilt beyond a reasonable doubt, as I have defined that term to you, you may then find the defendant guilty. (CJI 6.20)

Case law:

People v. Melito, 93 WL 264195 (July 16, 1993) (N.Y.A.D. 4 Dept.) [in memorandum decision, the court reverses under *Sullivan* where court informed the jury that reasonable doubt "is a doubt which leaves your mind in such a state of suspense that you are unable to say that you are convinced, to a moral certainty, of defendant's guilt"].

People v. Frank, 588 N.Y.S.2d 670 (1992) [instructions which employed the phrases "morally and reasonably certain" and "reasonable doubt must therefore be based entirely and absolutely on good sound substantial reason" and "it is possible to establish the guilt of a defendant . . . to a reasonable degree of certainty" "effectively reduced the People's burden

of proof and failed to convey the proper standard to the jury"; reversing under *Cage*].

NORTH CAROLINA

Currently approved instruction:

The defendant has entered a plea of "not guilty." The fact that he has been [indicted] [charged] is no evidence of guilt. Under our system of justice, when a defendant pleads "not guilty," he is not required to prove his innocence; he is presumed to be innocent. The State must prove to you that the defendant is guilty beyond a reasonable doubt.

A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt. (N.C.P.I.—Crim.101.10)

Case law:

State v. Williams, 93 WL 341049 (Sept. 10, 1993) [reversing under *Sullivan* for an instruction including "moral certainty" which was "essentially identical" to that in *Bryant, infra*].

State v. Bryant, 432 S.E.2d 291 (N.C. 1993) (examined this instruction on reasonable doubt:

When it is said that the jury must be satisfied of the defendant's guilty beyond a reasonable doubt, it is meant that they must be fully satisfied or entirely convinced or satisfied to a moral certainty of the truth of the charge. ¶ If, after considering, comparing and weighing all the evidence, the minds of the jurors are left in such condition that they cannot say they have an abiding faith to a moral certainty

in the defendant's guilt, then they have a reasonable doubt; otherwise not. ¶ A reasonable doubt, as that term is employed . . . is an honest substantial misgiving generated by the insufficiency of the proof.

The Court believes the crucial term in the [*Cage* instruction] is "moral certainty. The correct standard for conviction beyond a reasonable doubt is evidentiary certainty rather than moral certainty." Citing dictionaries, the Court says moral certainly "may exist when something is 'based upon strong likelihood or firm conviction, rather than upon the actual evidence or demonstration." "Truth is 'conformity to knowledge, fact, actuality, or logic, while the word moral is 'concerned with the judgment of the goodness or badness of human action and character.'" "A jury instruction which emphazises what is good or bad—a moral judgment, rather than truth—an evidentiary judgment, is inconsistent" with jury's role. A moral certainty instruction "increases the possibility that a jury may convict . . . because the jury believes he is morally guilty without regard to the sufficiency of the evidence presented at trial. . . Thus, when reasonable doubt is defined in terms of 'grave uncertainty' . . . and the jury is then told that what is required for conviction is moral certainty . . . the instruction will not pass muster under *Cage*."

NORTH DAKOTA

Currently approved instruction:

> The phrase "reasonable doubt" means what the words imply. It is a doubt based on reason arising from a thorough and impartial consideration of all of the evidence in the case. It is that state of mind in which you do not feel an abiding conviction amounting to a moral certainty of the truth of the charge. While you cannot convict the Defendant on mere surmise or conjecture, neither should you go outside the evidence to imagine doubts to justify acquittal. If, after careful deliberation, you are convinced to a moral certainty that the Defendant is guilty of the crime charged, then you are satisfied beyond a reasonable doubt. (North Dakota Pattern Jury Instruction on Reasonable Doubt, no. 2002)

Case law:

> *City of Minot v. Rubbelke*, 456 N.W.2d 511 (N.D. 1990) [affirming conviction based on reasonable doubt instruction stating the same concept as the pattern instruction in different terms].

OHIO

Currently approved instructions nos. 403.10 and 403.50:

> 403.10 Burden of proof
>
> 1. The defendant(s) is (are) presumed innocent until his (their) guilt is established beyond a reasonable doubt. The defendant(s) must be acquitted unless the state produces evidence which convinces you beyond a reasonable doubt of every essential element of the offense charged in the indictment (information) (complaint) (or of any lesser offense included within that charge).
>
> 403.50 Reasonable doubt
>
> 1. REASONABLE DOUBT IS PRESENT when, after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced of the truth of the charge. Reasonable doubt is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is

proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

R.C. SS 2901.05(D) explains reasonable doubt in the exact language of the above instruction.

OKLAHOMA

Currently approved instruction:

The defendant is presumed innocent of the crime charged, and the persumption continues unless, after consideration of all the evidence, you are convinced of his guilt beyond a reasonable doubt. The state has the burden of presenting the evidence that establishes guilt beyond a reasonable doubt.

The defendant must be found not guilty unless the state produces evidence which convinces you beyond a reasonable doubt of each element of the crime. (OUJI Cr.903)

Case law:

Pannell v. State, 640 P.3d 568, 570 (Okla. 1982) [precludes explanatory instruction regarding reasonable doubt].

OREGON

Currently approved instruction:

The defendant is innocent unless and until the defendant is proven guilty beyond a reasonable doubt. The burden is on the State to prove the guilt of a defendant beyond a reasonable doubt. Reasonable doubt means an honest uncertainty as to the guilt of the defendant. Reasonable doubt exists when, after careful and impartial consideration of all the evidence in the case, you do not feel convinced that

the defendant is guilty. Proof beyond a reasonable doubt is such as you would be willing to act upon in the most important of your own affairs. (U.Cr.J.I. no. 1006)

Case law:

State v. Castrejon, 856 P.2d 616 (Ore. July 22, 1993). [The trial court defined reasonable doubt as "mean[ing] just that," and "the State is not required to prove guilt beyond all doubt, but beyond a reasonable doubt." The defendant argued that the trial court's refusal to give his requested instruction, taken from Uniform Criminal Jury Instruction 1006, which *at that time* defined reasonable doubt as "an honest uncertainty" and "after careful and impartial consideration of all the evidence in the case, you do not feel convinced to a moral certainty that the defendant is guilty. Proof beyond a reasonable doubt is such as you would be willing to act upon in the most important of your own affairs." *As the December 1992 Comment to U.Cr.J.I. 1006 explains, "the instruction has since been changed to remove the reference to moral certainty in light of Cage."* Oregon Supreme Court holds that no "particular definition of reasonable doubt need be given to the jury" and that the instruction given did not mislead the jury, noting that many courts have agreed "that the phrase 'reasonable doubt' is its own best explanation.'" Footnote 7 notes that the trial court refused to give the requested "moral certainty" instruction because "I think it is misleading to instruct a jury [on] that because I do not and I don't think anyone can tell me what a moral certainty is, I believe—I have a great faith in the English language that the drafters [of the state and federal constitution] meant what they said, they said beyond a reasonable doubt."]

PENNSYLVANIA

Currently approved instruction:

> A reasonable doubt is such a doubt as would cause a person to hesitate in arriving at a conclusion in a matter of importance to that person; therefore, should you, after considering all of the evidence, have in your mind such a doubt as would cause you to hesitate in arriving at a conclusion in matters of importance to yourselves, then it is your duty to give the defendant the benefit of that reasonable doubt and find him not guilty. ¶ The doubt to be reasonable must be one which fairly strikes a conscientious mind and clouds the judgment. It is not such a doubt as one might dig up, conjure up, or summon up out of nowhere for purposes of escaping the consequences of an unpleasant verdict [], but it is a doubt which is reasonable, an honest and real doubt fairly arising out of the evidence that is presented with respect to some element of the crime. ¶ A reasonable doubt is not merely an imagined or passing fancy that come into the mind of a juror. It must be a doubt arising from the evidence that is *substantial* and well founded on reason and common sense. ¶ A reasonable doubt such as one takes notice of by a juror in deciding the case [] is of the same nature as a doubt that would cause a reasonable man or woman in the conduct of his or her own affairs in a matter of importance to himself or herself to stop, hesitate, and seriously consider as to whether he or she should do a certain thing before finally acting.

Case law:

> *Com. v. Stokes*, 615 A.2d 704 (Pa. 1992) [rejecting *Cage* challenge, and referring to above instruction as—except for one possibly improper word (substantial)—"an otherwise model charge"].

RHODE ISLAND

Currently approved instruction:

> No statewide pattern instructions.

Case law:

> *State v. DesRosiers*, 559 A.2d 641 (R.I. 1989) [upheld an instruction containing moral certainty language as adequate; there is no reported post-*Cage* decision].

SOUTH CAROLINA

Currently approved instruction:

> A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act.

Case law:

> *State v. Baker*, 424 S.E.2d 492 (S.C. 1992) [relying on *Manning* to hold the following instruction defective: "A reasonable doubt . . . is a doubt arising from the evidence . . . that created a strong uncertainty in your minds. . . ."].
>
> *State v. Manning*, 409 S.E.2d 372 (S.C. 1991) [trial court defined reasonable doubt as "substantial doubt" for which you can give "a real reason" and "moral certainty and beyond a reasonable doubt are the same things" both of which connote "a degree of proof which is distinguished from an absolute certainty"; the S.C. Supreme Court reversed holding that *Cage* "disapproved a standard of moral rather than evidentiary certainty" and such a charge is misleading "in that it allows a juror to base a finding of guilty upon a subjective feeling rather than upon an evaluation of the evidence," holding that the use "of a moral certainty standard" is a constitutional

violation when "it is combined with other terms [] which 'suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard' "].

State v. Johnson, 410 S.E.2d 547 (S.C. 1991) [upholding an instruction that defined reasonable doubt as a substantial, not a "weak doubt, or a fanciful doubt" because, unlike *Manning*, the term substantial doubt was not used *in combination* with the reference to moral rather than evidentiary certainty].

SOUTH DAKOTA

Currently approved instruction:

> The state has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the state's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things that we know with absolute certainty. In criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and return a verdict of not guilty. (South Dakota Pattern Instruction 1-6-1)

TENNESSEE

Currently approved instruction:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a captious, possible or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense. (Tennessee Pattern Jury Instructions—Criminal (3d ed. 1992))

Case law:

> No reported decision since *Cage*.

TEXAS

Currently approved instruction:

> A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon own affairs. In the event you have a reasonable it without hesitation in the most important of your own affairs in a matter of importance ot himself or doubt as to the defendant's guilt . . . you will acquit. . . .

Case law:

> *Geesa v. State*, 820 S.W.2d 154 (Tex.Cr.App. 1991) [reversing where *no* definition of reasonable doubt

was given, and ruling that the above instruction should be given in all subsequent cases].

UTAH

Currently approved instruction:

I have heretofore told you that the burden is upon the State to prove the defendant guilty beyond a reasonable doubt. Proof beyond a reasonable doubt does not require proof to an absolute certainty. Now by a reasonable doubt is meant a doubt that is based on reason and one which is reasonable in view of all the evidence. It must be a reasonable doubt and not a doubt which is merely fanciful or imaginary or based on a wholly speculative possibility. Proof beyond a reasonable doubt is that degree of proof which satisfies the mind, convinces the understanding of those who are bound to act conscientiously upon it and obviates all reasonable doubt. A reasonable doubt is a doubt which reasonable men and women would entertain, and it must arise from the evidence or the lack of evidence in this case.

Case law:

State v. Johnson, 774 P.2d 1141 (Utah 1989)
State v. Huston, 811 P.2d 929 (Utah App. 1991)

VERMONT

Currently approved instruction:

No statewide pattern instruction.

Case law:

State v. Francis, 561 A.2d 392 (1989) [no definition or explanation of reasonable doubt required].

VIRGINIA

Currently approved instruction:

The defendant is presumed to be innocent. You should not assume the defendant is guilty because he has been indicted and is on trial. The presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the offense beyond a reasonable doubt. This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence. However, suspicion or probability of guilt is not enough for a conviction.

There is no burden on the defendant to produce any evidence.

A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case. (Pattern instruction 2.100)

Case law:

Cooper v. Comm., 345 S.E.2d 775 (Va.App. (1986) [discourages explanations of reasonable doubt].

WASHINGTON

Currently approved instruction:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The state is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt. (WPIC 4.01)

See also WPIC 4.01A (simplified alternative):

The defendant has entered a plea of not guilty, which puts in issue every element of the crime charged. The State, as plaintiff, has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless you find during your deliberations that it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason can be given and may arise from the evidence or lack of evidence. A reasonable doubt is a doubt that would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence."

WEST VIRGINIA

Currently approved instruction:

No statewide pattern instruction.

Case law:

State v. Beckett, 310 S.E.2d 883 (W.VA.1983) [discourages explanations].

WISCONSIN

Currentlly approved instruction:

Wis.J.I.—Crim. 140 includes language that "a reasonable doubt is a doubt for which a reason can be given"; "a doubt which ignores a reasonable interpretation of the evidence is not a reasonable doubt"; and "you are to search for the truth and give the defendant the benefit of a reasonable doubt if it exists in your minds after you have carefully considered all of the evidence in this case."

Case law:

State v. Bembenek, 331 N.W.2d 616 (Wis.App. 1983) [approving pattern instruction].

WYOMING

Currently approved instruction:

Explanation or definition prohibited.

Case law:

Collins v. State, 854 P.2d 688 (Wyo. 1993) [prohibits definitions or explanations].

DISTRICT OF COLUMBIA

Currently approved instruction:

Reasonable doubt, as the name implies, is a doubt based on reason, a doubt for which you can give a reason. It is such a doubt as would cause a juror, after careful and candid and impartial consideration

of all the evidence, to be so undecided that he cannot say that he has an abiding conviciton of the defendant's guilt. It is such a doubt as would cause a reasonable person to hesitate or pause in the graver or more important transactions of life. However, it is not a fanciful doubt nor a whimsical doubt, nor a doubt based on conjecture. It is a doubt which is based on reason. The government is not required to establish guilt beyond all doubt, or to a mathematical certainty. Rather, its burden is to establish guilt beyond a reasonable doubt. (District of Columbia Criminal Jury Instructions no. 2.09 (3d ed. 1978))

Case law:

United States v. Merlos, 984 F.2d 1239 (D.C. Cir. 1993) [approving above instructions].

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No. 92-9049

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1993

Alfred Arthur Sandoval, ***Petitioner,***

v.

State of California, ***Respondent.***

ON WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

RESPONDENT'S BRIEF ON THE MERITS

---

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QUESTION PRESENTED

Did California's pattern jury instruction on reasonable doubt deprive petitioner of due process and a fair jury trial by inviting his jury to base its verdict on improper "moral" considerations rather than on an evidentiary evaluation?

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. California's Standard Jury Instruction on Reasonable Doubt Comports with the Constitutional Burden of Proof in Criminal Cases	4
A. Introduction	4
B. CALJIC 2.90 is Constitutional	7
1. General analytical approach: The instruction must be viewed in its entirety, not in out-of-context fragments	7
2. CALJIC 2.90 adopts no "plainly" distorting standard of proof	10
a. Moral Certainty	11
b. Moral Evidence	31
c. Not A Mere Possible Doubt	34

II. Any Invalidation of the California Instruction Should Apply Only Prospectively 38

CONCLUSION 46

APPENDIX App. 1 - App. 15

TABLE OF AUTHORITIES

Cases	Page
Addington v. Texas, 441 U.S. 418 (1979)	18, 20
Allman v. State, 571 So. 2d 244 (Miss. 1990)	26
Apodaca v. Oregon, 406 U.S. 404 (1972)	45
Bieghler v. State, 481 N.E.2d 78 (Ind. 1985)	26
Bowen v. State, 715 P.2d 1093 (Okla. Crim. App. 1984)	24
Boyde v. California, 494 U.S. 370 (1990)	7, 17, 18
Bradford v. State, 412 S.E.2d 534 (Ga. 1992)	24
Cage v. Louisiana, 498 U.S. 39 (1990)	6, 10
Canton v. Harris, 489 U.S. 378 (1989)	20
City of Minot v. Rubbelke, 456 N.W.2d 511 (N.D. 1990)	24, 27

Commonwealth v. Banks,
311 A.2d 576 (Pa. 1973) 24, 27

Commonwealth v. Beldotti,
567 N.E.2d 1219 (Mass. 1991) 13

Commonwealth v. Dinkins,
615 N.E.2d 570 (Mass. 1993) 24

Commonwealth v. Webster,
59 Mass. (5 Cush.) 295 (1850) 4

Cool v. United States,
409 U.S. 100 (1972) 30

Cupp v. Naughten,
414 U.S. 141 (1973) 6, 7, 18

Dowling v. United States,
493 U.S. 342 (1990) 6

Egantoff v. State,
208 So. 2d 843 (Fla. App. 1968) 24

Ellis v. State,
356 S.W.2d 426 (Ark. 1962) 24

Estelle v. McGuire,
112 S. Ct. 475 (1991) 6, 7, 9, 12

Ex Parte Adkins,
600 So. 2d 1067 (Ala. 1992) 13, 21

Ex parte McWilliams,
1993 Ala. LEXIS 316 at *29
(Mar. 19, 1993) 23

Gaskins v. McKellar,
111 S.Ct. 2277 (1991) 10, 13

Griffith v. Kentucky,
479 U.S. 314 (1987) 39, 40

Hardin v. State,
355 S.W.2d 105 (Tenn. 1962) 24

Hatheway v. Secretary of Army,
641 F.2d 1376 (9th Cir. 1981) 23

Hicks v. State,
425 S.E.2d 877 (Ga. 1993) 24

Hockenbury v. Commonwealth,
565 S.W.2d 448 (Ky. 1978) 26

Holland v. United States,
348 U.S. 121 (1954) 6, 7, 9, 32

Hopt v. Utah,
120 U.S. 430 (1887) 6, 21, 23, 31, 32

Illinois v. Krull,
480 U.S. 340 (1987) 41, 42

In re Winship,
397 U.S. 358 (1970) 5, 9, 18

Jackson v. Virginia,
443 U.S. 307 (1979) 18, 36

Lanigan v. Maloney,
853 F.2d 40 (1st Cir. 1988) 15, 21-23, 26, 35

Lee v. State,
813 P.2d 1010 (Nev. 1991) 24

Linkletter v. Walker,
381 U.S. 618 (1965) 40

Marshall v. State,
528 S.W.2d 823 (Tenn. Crim. App. 1975) 24

Miles v. United States,
103 U.S. 304 (1881) 23

Monk v. Zelez,
901 F.2d 885 (10th Cir. 1990) 14

Morrissey v. Brewer,
408 U.S. 471 (1972) 42

People of Territory of Guam v. Yang,
800 F.2d 945 (9th Cir. 1986) 24, 26

People v. Brigham,
599 P.2d 100 (Cal. 1979) 21, 38

People v. Hewlett,
519 N.Y.S.2d 555 (App. Div. 1987) 25

People v. Jennings,
807 P.2d 1009 (Cal. 1991) 13, 24

People v. Palumbo,
555 P.2d 521 (Colo. 1976) 26

People v. Rawlins,
569 N.Y.S.2d 635 (App. Div. 1991) 24

People v. Simmons,
95 N.E.2d 477 (Ill. 1950) 26

People v. Turner,
298 N.W.2d 848 (Mich. App. 1980) 24

Perez v. Irwin,
963 F.2d 499 (2d Cir. 1992) 25

Rivett v. State,
578 P.2d 946 (Alaska 1978) 24

Roberts v. State,
620 P.2d 425 (Okla. Crim. App. 1980) 27

State v. Bernal,
330 N.W.2d 219 (Wis. App. 1983) 27

State v. Brewer,
197 N.W.2d 409 (S.D. 1972) 24

State v. Bult,
351 N.W.2d 731 (S.D. 1984) 27

State v. Bush,
569 P.2d 349 (Haw. 1977) 24

State v. Butler,
543 A.2d 270 (Conn. 1988) 26

State v. Cage,
554 So. 2d 39 (La. 1989) 25

State v. Caruolo,
524 A.2d 575 (R.I. 1987) 24

State v. Castrejon,
856 P.2d 616 (Or. 1993) 27

State v. Chavarria,
1993 Ariz. App. LEXIS 165
(Aug. 19, 1993) 37

State v. Donovan,
419 A.2d 1102 (N.H. 1980) 24

State v. Duzan,
1993 Ariz. App. LEXIS 58 at *19
(Apr. 13, 1993) 37

State v. Finnegan,
237 N.W.2d 459 (Iowa 1976) 26

State v. Flores,
566 P.2d 1281 (Wash.App. 1977) 24

State v. Franklin,
163 N.W.2d 437 (Iowa 1968) 24

State v. Harris,
481 P.2d 504 (Ariz. 1971) 27

State v. Johnson,
774 P.2d 1141 (Utah 1989) 27

State v. Lane,
244 A.2d 108 (N.J. 1968) 27

State v. Manning,
409 S.E.2d 372 (S.C. 1991) 25

State v. Morley,
474 N.W.2d 660 (Neb. 1991) 24

State v. Olkon,
299 N.W.2d 89 (Minn. 1980) 26

State v. Pratt,
853 P.2d 827 (Or. 1993) 27

State v. Rhoades,
822 P.2d 960 (Idaho 1991) 13, 24

State v. Schmeig,
322 N.W.2d 759 (Minn. 1982) 26

State v. Seneff,
435 N.E.2d 680 (Ohio App. 1980) 25

State v. Tanzymore,
340 P.2d 178 (Wash. 1959) 27

State v. Udstuen,
345 N.W.2d 766 (Minn. 1984) 26

State v. Varela,
1993 Ariz. App. LEXIS 226 at *20
(Oct. 5, 1993) 37

State v. Watson,
240 S.E.2d 440 (N.C. 1978) 27

State v. Wilkerson,
291 A.2d 8 (N.J. 1972) 24

State v. Wilkins,
523 P.2d 728 (Kan. 1974) 24

State v. Williams,
828 P.2d 1006 (Or. 1992) 13, 25, 37

Stewart v. State,
601 So.2d 491 (Ala. Crim. App. 1992) 24

Stovall v. Denno,
388 U.S. 293 (1967) 40, 42

Sullivan v. Louisiana,
113 S. Ct. 2078 (1993) 12, 43

Taylor v. Kentucky,
436 U.S. 478 (1978) 14, 17

Teague v. Lane,
489 U.S. 288 (1989) 39, 44

United States v. Byrd,
352 F.2d 570 (2d Cir. 1965) 14

United States v. Del Toro Soto,
676 F.2d 13 (1st Cir. 1982) 25

United States v. Drake,
673 F.2d 15 (1st Cir. 1982) 14

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628 F.2d 711 (1st Cir. 1980) 14

United States v. Johnson,
457 U.S. 537 (1982) 40

United States v. Moss,
756 F.2d 329 (4th Cir. 1985) 14

United States v. Peltier,
422 U.S. 531 (1975) 41, 45

United States v. Russell,
971 F.2d 1098 (4th Cir. 1992) 23, 27

United States v. Smaldone,
485 F.2d 1333 (10th Cir. 1973) 23

Walker v. City of New York,
974 F.2d 293 (2d Cir. 1992) 20

Watson v. State,
521 So.2d 1290 (Miss. 1988) 26

Williams v. Florida,
399 U.S. 78 (1970) 45

Williams v. United States,
401 U.S. 646 (1971) 45

Wilson v. United States,
232 U.S. 563 (1914) 23

Young v. Anderson,
513 F.2d 969 (10th Cir. 1975) 23

Statutes

Cal. Penal Code § 1096 4

Cal. Penal Code § 1096a 4

Cal. Penal Code § 1259 38

Cal. Penal Code § 1382 39

Other Authorities

CALJIC 1.00 13, 16, 17, 33

CALJIC 1.01 7, 9, 13, 17

CALJIC 2.90 4, 5, 7-11, 13-18, 21, 31-34, 37, 38, 42, 43

CALJIC 8.10 34

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Argument to the Jury, (1993) 28

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STATEMENT OF THE CASE

On October 14, 1984, petitioner shot and killed both Gilbert Martinez and Anthony Aceves during a gang-related fight in Los Angeles. Petitioner also attempted to kill Manuel Torres during the gang fight. Several eyewitnesses saw petitioner kill his unarmed victims. (Rep.'s Tr. 2354-2650.) Petitioner's theory of defense at trial was that he had killed in self-defense. (Rep.'s Tr. 4369-70, 4404.)

Seventeen days later, on October 31, petitioner shot and killed Ray and Marlene Wells in their home, because they had given police information concerning the location of the car petitioner had used on the night of the Martinez and Aceves murders. Petitioner telephoned Benjamin Verduzco after the murders and told him that he had killed the Wellses because they had "snitched" to the police about his car. (Rep.'s Tr. 3264-97.) As to these crimes, petitioner at trial presented an alibi defense. (Rep.'s Tr. 4569, 4958-66, 5031-54.)

A jury convicted petitioner of four counts of first degree murder and one count of attempted murder. (Clerk's Tr. 1495-96, 1608.) The jury also found that petitioner had committed multiple murders, rendering him subject to the death penalty. Cal. Penal Code § 190.2. After the penalty phase of the trial, the jury found death to be the appropriate punishment for petitioner's murder of Marlene Wells, and life imprisonment without possibility of parole to be the appropriate punishment for his murders of Gilbert Martinez, Anthony Aceves, and Raymond Wells. (Clerk's Tr. 1733.)

The California Supreme Court affirmed the judgment and penalty in its entirety.

SUMMARY OF ARGUMENT

In California, state statutes set forth the prosecution's burden of proving a criminal defendant guilty beyond a reasonable doubt, define "reasonable doubt," and specifically allow state courts to instruct on reasonable doubt in the statutory language. In accord with the statutes, the standardized set of pattern jury instructions, almost invariably employed in California criminal trials, includes an instruction on reasonable doubt in that same statutory language.

Petitioner Sandoval, relying primarily upon this Court's decision in *Cage v. Louisiana,* 498 U.S. 39 (1990), now claims that this standardized jury instruction on reasonable doubt deprived him of the fair trial guaranteed by the Due Process Clause. To prevail in this claim, however, he must show a *reasonable likelihood* that his jury interpreted the instruction in a way that lightened the prosecution's burden of proving guilt beyond a reasonable doubt. *Estelle v. McGuire*, 112 S. Ct. 475, 482 & n.4 (1991).

California's reasonable doubt instruction differs dramatically from the one this Court held unconstitutional in *Cage.* The infirm instruction in *Cage* directly redefined "reasonable doubt" -- as "actual substantial doubt," and "grave uncertainty" -- in ways that plainly increased the level of doubt that should trigger an acquittal. *Cage*, 498 U.S. at 41. The California instruction, in contrast, nowhere re-quantifies the degree of acquittal-triggering doubt in any way that "plainly" suggests a higher degree of doubt than simple "reasonable" doubt.

The California instruction's references to the terms "moral evidence," "moral certainty," and "mere possible

doubt," the main targets of petitioner's criticisms, do not operate in a way that makes it reasonably likely a juror would apply an erroneous standard for "proof beyond a reasonable doubt." The instruction first merely acknowledges the truism that the prosecution, engaged in an enterprise that always must admit the potential effect of human fallibility, is not required to prove the defendant's guilt to an absolute certainty beyond all possible or imaginary doubt. Then it emphasizes the solemnity of the juror's decision to find a criminal defendant guilty and the heightened degree of subjective certainty required to sustain a verdict of guilt. In doing so, the instruction promotes -- and, more important, does not undermine -- the constitutional goal of "'impress[ing] on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'" *In re Winship,* 397 U.S. 358, 364 (1970).

Petitioner's own criticism of these terms is a failure. He improperly removes and isolates words and phrases out of their proper context in the instructions. And he implausibly ascribes to them meanings inconsistent with their contextual meanings. Finally, petitioner ignores other standard instructions that render the risks he discerns in the reasonable-doubt instruction especially improbable.

Even if this Court were to hold the California instruction unconstitutional, such a holding should apply prospectively only. This Court should recognize, given the uniqueness of this case, an exception to the normal rule of retroactivity in non-final cases. *Griffith v. Kentucky*, 479 U.S. 314 (1987).

ARGUMENT

I. California's Standard Jury Instruction on Reasonable Doubt Comports with the Constitutional Burden of Proof in Criminal Cases.

A. Introduction.

Since 1927 in California, state statutes (a) have set forth the prosecution's burden of proving a criminal defendant guilty beyond a reasonable doubt, (b) have amplified the concept of "reasonable doubt," and (c) specifically have allowed state courts to instruct on reasonable doubt in the statutory language. Cal. Penal Code §§ 1096, 1096a. The statutory description of reasonable doubt finds its roots in a well-known 1850 case decided by the Supreme Judicial Court of Massachusetts. *Commonwealth v. Webster,* 59 Mass. (5 Cush.) 295, 320 (1850). In accord with the statutes, the standardized set of pattern jury instructions almost invariably employed in California criminal trials includes an instruction, CALJIC 2.90,[1/] that describes reasonable doubt in that same statutory language.

The judge in petitioner's trial, therefore, instructed the jury about the prosecution's burden of proving guilt beyond a reasonable doubt in the language of CALJIC 2.90:

---

1. The Committee on Standard Jury Instructions, Criminal, of the Superior Court of Los Angeles County, California, *California Jury Instructions Criminal,* (Phillip H. Richards ed., 4th ed. 1979) (hereinafter CALJIC). Where excerpts of CALJIC instructions are quoted in this brief with portions italicized, the emphasis has been added by respondent.

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

(J.A. 49.)

This instruction states correctly that the prosecution bears the burden of proving the defendant guilty "beyond a reasonable doubt." *In re Winship,* 397 U.S. 358, 364 (1970). In fact, it employs the phrase "reasonable doubt" three separate times. And other standard instructions, given to the jury in petitioner's case, repeat that standard many more times. (J.A. 49-50, 56-57, 63.)

Petitioner never objected to CALJIC 2.90 at trial or sought modification of it. That is not surprising, given the benefits to the defense that *trial lawyers* discern in the instruction. *See infra* pp. 26-31. Perhaps recognizing those benefits, petitioner's trial lawyer repeatedly employed the challenged language of the instruction in his arguments to the jury. (J.A. 79, 84-86; *see infra* note 9.) It was not until the supplemental briefing stage of the state appeal -- two years after this Court's decision

in *Cage v. Louisiana,* 498 U.S. 39 (1990) (per curiam) – that petitioner voiced any dissatisfaction with this traditional instruction.

Nevertheless, petitioner now claims that this standardized jury instruction on reasonable doubt, notwithstanding its roots in tradition, deprived him of the fundamentally fair trial guaranteed by the Due Process Clause. Indeed, he does so notwithstanding his concession that, at least until some point in the past, "the crucial" challenged portions of the instruction carried meaning "consistent with the then-existing *and* with today's understanding of proof beyond a reasonable doubt." (Pet'r's Br. 5; *see id.* 34.)

This Court, however, has "'defined the category of infractions that violate "fundamental fairness" very narrowly.'" *Dowling v. United States,* 493 U.S. 342, 352 (1990). "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Id.* Because this Court remains mindful of these restrictions in reviewing claims of unconstitutional jury instructions, *Estelle v. McGuire,* 112 S. Ct. 475, 482 (1991), petitioner's success in this case requires him to meet a heavy burden. It would not be enough for him to show that the challenged instruction is unhelpful or subject to valid criticism, *see Hopt v. Utah,* 120 U.S. 430, 440-41 (1887), or that it is confusing on the reasonable-doubt standard, *see Holland v. United States,* 348 U.S. 121, 140 (1954), or that it is undesirable or disfavored, or even that it is universally condemned, *Cupp v. Naughten,* 414 U.S. 141, 146 (1973). Instead, he must show a *reasonable likelihood* that his jury interpreted the instruction in a way that lightened the prosecution's

burden of proving guilt beyond a reasonable doubt. *McGuire,* 112 S. Ct. at 482 & n.4; *see Holland,* 348 U.S. at 140.

B. CALJIC 2.90 is Constitutional.

1. General analytical approach: The instruction must be viewed in its entirety, not in out-of-context fragments.

As the focus of an attack intended to demonstrate a reasonable likelihood that his jury misinterpreted the instruction to dilute the standard of proof, petitioner cites the references in CALJIC 2.90 to "moral evidence" and "moral certainty," and the reference to reasonable doubt as something other than "mere possible" or "imaginary" doubt. His critique, however, is misplaced in a constitutional analysis. Instead of trying to demonstrate unconstitutionality in the meaning imparted by the entirety of the instruction, with all of the challenged language viewed in full context, *see Boyde v. California,* 494 U.S. 370, 380-81 (1990); *Naughten,* 414 U.S. at 146-47, petitioner concentrates myopically on individual words divorced from phrases and on abstract phrases divorced from the relevant sentences.

Petitioner's jury was instructed "not to single out any certain sentence or any individual point or instruction and ignore the others," but instead to consider "all the instructions as a whole and . . . to regard each in light of all the others." CALJIC 1.01; J.A. 39. Yet petitioner stubbornly proceeds to dissect a trio of phrases -- "moral evidence," "moral certainty," and "some possible or imaginary doubt" -- in sterile isolation. He concludes from this lifeless autopsy that these three phrases invite

the jurors (1) to rely on extra-evidentiary sources, (2) to render a mere moral judgment about the defendant and his conduct, and (3) to do so under a watered-down standard of proof prohibiting acquittal unless innocence appears "probable." But he never deals with the phrases in the context of the entire active instruction -- the organic whole -- and it is the entire functioning instruction rather than mere disembodied components of it that petitioner must try to defeat in this case.

In the actual instruction, these phrases operate to convey ideas quite different from those petitioner ascribes to them in abstract isolation. After informing the jury of the presumption of the defendant's innocence, CALJIC 2.90 functions as a whole to state the prosecution's burden of proof as "beyond a reasonable doubt," to impart some helpful but non-controversial observations about reasonable doubt, and to emphasize the high level of subjective certainty required to overcome reasonable doubt. Viewed in full context, the instruction virtually self-defines "moral evidence," not as having anything to do with the defendant's or the jurors' morality, but as the potentially fallible kind of courtroom evidence with which jurors unavoidably must reckon in determining which retrospective version of the events at issue is true. And, by distinguishing reasonable doubt from "mere possible" or "imaginary" doubt, the instruction in no way implies that a defendant's innocence must be probable in order to require acquittal. The instruction merely signals that not every imaginable doubt jurors might conjure will necessarily amount to a reasonable doubt.

The California instruction then emphasizes the high standard of proof in criminal cases by likening reasonable doubt to "that state of the case which, after

the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." The instruction therefore endorses no source for the jury's verdict other than "the case" and "the evidence"; and, indeed, a separate standard instruction requires the jury to determine the facts "from the evidence" and "not from any other source." CALJIC 1.01; J.A. 38. It poses no question of the defendant's morality to be resolved, but only the question of "the truth of the charge." And it provides no standard of proof other than "beyond a reasonable doubt." In fact, "reasonable doubt" appears as the standard three times in the challenged instruction and numerous other times in the surrounding instructions, so it is not likely the jurors were unmindful of it as the core concept guiding their deliberations.

A proper analysis of the California instruction in its entirety and in context with other instructions -- rather than when broken apart into unrecognizable fragments -- will show that the instruction comports with the Constitution's goal of assuring that jurors reach a "subjective state of certitude" that guilt has been proved beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364 (1970). Even more to the point, proper analysis of the instruction will refute petitioner's claim that there is a "reasonable likelihood" the jurors in his case interpreted CALJIC 2.90 to dilute the constitutional standard of proof applicable to criminal cases. *McGuire,* 112 S. Ct. at 482 & n.4; *Holland,* 348 U.S. at 140.

2. CALJIC 2.90 adopts no "plainly" distorting standard of proof.

Petitioner's constitutional attack on CALJIC 2.90 relies for its foundation upon this Court's opinion in *Cage v. Louisiana,* 498 U.S. 39 (1990) (per curiam). There, this Court struck down Louisiana's reasonable doubt instruction as unconstitutional. California's reasonable doubt instruction, however, differs dramatically from the one invalidated in *Cage.*

Most important, the California instruction avoids the serious error of employing terms that are themselves dangerous and distorting as direct analogues or equivalents of "reasonable doubt." The Louisiana instruction fell into that mistake, for it allowed the particularly dangerous terms "substantial doubt" and "grave uncertainty" to operate as direct substitutes for "reasonable doubt." This Court's condemnation of those descriptions was crucial to its decision in *Cage:* "[i]t is plain to us that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." 498 U.S. at 41. The California instruction, in contrast, does not distort the definition of reasonable doubt by defining it as "actual substantial doubt," or "grave uncertainty," or as any other similar kind of doubt. Indeed, the California instruction does not even depart from the traditional expression of the core concept of "reasonable doubt" as "doubt" that is anything other than "reasonable." The plainly dangerous choice of the terms "substantial" and "grave" in the Louisiana instruction, and the absence of any such terminology in CALJIC 2.90, fundamentally distinguishes this case from *Cage. See Gaskins v. McKellar,* 111 S. Ct.

2277, 2277 (1991) (Stevens, J., concurring) (order denying petition for certiorari).

Petitioner, of course, claims to detect similar dangerous distortion in the phrases "moral certainty," "moral evidence," and "not a mere possible doubt" found in CALJIC 2.90. But he cannot substantiate his assertions. He acknowledges that, at least up to some point in the past, California's instruction and its use of these terms comported fully with the standard of proof beyond a reasonable doubt. (Pet'r's Br. 5.) His argument that the isolated phrases have undergone some gradual transformation in the meantime, however, is generally beside the point. Instead, when those phrases are used even today in the context of CALJIC 2.90, the entire instruction continues to pass constitutional muster.

a. Moral Certainty.

1. Moral Certainty and Evidentiary Certainty: The reference to "moral certainty" in CALJIC 2.90 does not suggest that the jurors are to determine guilt upon any basis other than the evidence in the case.

It is true, of course, that this Court in *Cage* questioned the Louisiana instruction's statement -- that "'[w]hat is required is not an absolute or mathematical certainty, but a moral certainty'" -- and pointed out that the statement referred to "moral certainty" rather than to "evidentiary certainty." 498 U.S. at 40-41. But, as noted above, the gravamen of the *Cage* holding was the distorting effect worked by the "actual substantial doubt" and "grave uncertainty" language. To the extent this Court questioned the "moral certainty" language in *Cage,*

it did so in light of the obvious deleterious impact the other condemned reformulations of reasonable doubt exerted on it.

> The charge . . . equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty. It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. *When those statements are then considered with the reference to "moral certainty,"* rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted [2/] the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

498 U.S. at 41 (emphasis added). California's instruction, as noted above, does not repeat those erroneous formulations of reasonable doubt as "grave uncertainty" and "actual substantial doubt." The absence

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2. Since the decision in *Cage*, this Court has expressly disapproved the standard of review for jury instructions used in *Cage* and determined that the proper constitutional inquiry is whether there is a "reasonable likelihood" the defendant's jury has misinterpreted the instruction in a way incompatible with the Constitution, rather than whether a reasonable juror "could have interpreted" the instruction in the constitutionally condemned way. *McGuire*, 112 S.Ct. at 482 n.4. Given this new standard of review, it is an open question whether even the Louisiana instruction at issue in *Cage*, or an instruction equivalent to it, still would be deemed unconstitutional today. *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2081 n.1 (1993).

of those other condemned descriptions of reasonable doubt brings the California instruction, notwithstanding its employment of the term "moral certainty," outside the ambit of *Cage's* condemnation of the Louisiana instruction as unconstitutional. *See Ex Parte Adkins*, 600 So. 2d 1067, 1071 (Ala. 1992); *People v. Jennings*, 807 P.2d 1009, 1041-42 (Cal. 1991); *State v. Rhoades*, 822 P.2d 960, 979-80 (Idaho 1991); *Commonwealth v. Beldotti*, 567 N.E.2d 1219, 1225 (Mass. 1991); *State v. Williams*, 828 P.2d 1006, 1020-21 (Or. 1992); *see also Gaskins v. McKellar*, 111 S.Ct. 2277, 2277 (1991) (Stevens, J., concurring) (order denying petition for certiorari).

In addition, the phrase "moral certainty" in the California instruction, unlike in the Louisiana charge, is explicitly linked to the jurors' evaluation of the evidence in the case. Reasonable doubt thus is equated in CALJIC 2.90 with "that state of *the case* which, after *the entire comparison and consideration of all the evidence*, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of *the truth of the charge*." A second standard California instruction, which the jury in petitioner's trial was told to regard "in light of all the others," expressly confirmed that the jury was to "determine the facts of the case *from the evidence received in the trial and not from any other source*." CALJIC 1.00, 1.01; J.A. 38, 39. The reference to "moral certainty" rather than to "evidentiary certainty" in the California instruction, then, does not pose a risk comparable to that in the Louisiana instruction.

Respondent acknowledges that some courts have criticized use of the term "moral certainty" in similar contexts on grounds, for example, that the phrase has been subjected to "mixed reviews" and "could be

interpreted to mean that the certainty is based on feeling, *i.e.,* moral conviction, rather than facts." Those views were expressed in the First Circuit opinion in *United States v. Indorato,* 628 F.2d 711, 721 & n.8 (1st Cir. 1980), an opinion cited by this Court in *Cage.*[3/] But mere "mixed reviews" and mere possible misinterpretations do not establish the unconstitutional "reasonable likelihood" that petitioner's jury misapplied the instructions in his case in a way that diminished the prosecution's burden of proof. Even in *Indorato* the court found no "legal or constitutional error." 628 F.2d at 721.

Moreover, in *United States v. Drake,* 673 F.2d 15, 21 n.6 (1st Cir. 1982), the same Circuit tempered its criticism of the "moral certainty" language. *Drake* noted the term was "less objectionable" (1) when it is phrased, as it is in CALJIC 2.90, as a "negative" description of the inability of jurors to attain certainty, rather than in a

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3. The other cases cited by this Court in *Cage* lend petitioner scant support in his attack on California's instruction. In *Monk v. Zelez,* 901 F.2d 885, 889-90 (10th Cir. 1990), the appellate court concluded, not that "moral certainty" language was objectionable, but only that it was not enough to cure other errors in the instruction at issue. On the validity of the "moral certainty" language itself, the court characterized it as the strongest language in the charge that might have served to correct the diluting effect of the other errors. *United States v. Moss,* 756 F.2d 329, 333 (4th Cir. 1985), took the position that judges should not try to define reasonable doubt to the jury. In *United States v. Byrd,* 352 F.2d 570, 575 (2d Cir. 1965), the jury was instructed that it could acquit only if they harbored a "doubt to a moral certainty." That is the opposite of the California instruction. In *Taylor v. Kentucky,* 436 U.S. 478, 488 (1978), this Court criticized, not "moral certainty" language, but an instruction that referred to reasonable doubt as "substantial" and "real," and that did so in the absence of any presumption-of-innocence instruction.

"positive" way as a direct definition of "proof beyond a reasonable doubt" and (2) when the context makes clear, like it also does in CALJIC 2.90, that the jury must make its decision "after careful and impartial consideration *of the evidence.*" *Id.* at 20, 21 n.6.

Finally, a later First Circuit opinion in *Lanigan v. Maloney,* 853 F.2d 40, 43 (1st Cir. 1988) applauded the Massachusetts *Webster* instruction, the model for California's, finding it "hard . . . to imagine a charge more reflective of the solemn and rigorous standard intended." *Lanigan,* indeed, criticized an attempted *departure* from the "moral certainty" language that watered the phrase down to reflect only "*a degree of* moral certainty." Unlike the phrase "moral certainty" itself, *Lanigan* recognized, the departure from the phrase "failed to convey the critical point that, while absolute certainty is unnecessary, a belief in guilt at least approaching certainty was required." 853 F.2d at 47 & n.4 (emphasis in original). Although acknowledging the Circuit's prior criticisms of the unadorned phrase "moral certainty," *Lanigan* noted that the instruction there at issue -- like the one at issue in this case -- linked the phrase "with other terms emphasizing the high degree of proof needed." *Id.,* at n. 4. Thus, as in this case, the instruction in *Lanigan* referred not merely to moral certainty, but to "an abiding conviction to a moral certainty." *Id.*

Petitioner cites dictionary definitions and examples of contemporary usage of "moral certainty" in newspapers and magazines to try to show that, as used nowadays, the phrase commonly conveys the strength of beliefs founded upon sources other than empirical evidence. (Pet'r's Br. 25-30.) The pertinent question for this source-of-certainty argument, however, is not what a dictionary

might say "moral certainty" means in the abstract and in isolation. Nor is the question what people mean by "moral certainty" when they use the phrase in informal situations where their certitude happens not to be based upon a formal courtroom evidentiary demonstration.

The real question is what jurors in a criminal case would understand by an instruction setting out the prosecution's burden of proof as "beyond a reasonable doubt" and offering them a way of thinking about proof beyond a reasonable doubt in the language of CALJIC 2.90. Phrased in the way most relevant to this appeal, the crucial question is, again, whether it is reasonably likely that petitioner's jury -- despite being instructed specifically of the necessity of having an abiding conviction to a moral certainty of "the truth of the charge" after full consideration of "all the evidence" -- nevertheless felt authorized somehow to base their factual conclusions on anything but the factual evidence adduced at trial.

Petitioner's dictionary and usage examples do not materially aid in answering that question. They in no way suggest that the phrase "moral certainty" becomes incomprehensible when explicitly premised upon a foundation of objective evidence. One who is morally certain that heroin use among children is bad, or that cannibalism is wrong, logically and naturally may also be equally "morally certain" about the existence of certain facts. The California instruction asks jurors to be certain of evidentiary facts in that way, *i.e.*, to have an abiding conviction to a moral certainty of the truth of the charges *based upon all the evidence at trial.*

Even if CALJIC 2.90 by itself risked the unlikely misinterpretations suggested by petitioner, that would not be the end of the inquiry. Instead, a challenged

instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole. *Boyde v. California,* 494 U.S. 370, 380-81 (1990). In this case, the jury received other standard instructions, besides the reasonable-doubt charge contained in CALJIC 2.90, that further insured against the risk of extra-evidentiary verdicts that petitioner perceives. As already noted, petitioner's jury was specifically instructed "to determine the facts of the case *from the evidence received in the trial and not from any other source.*" CALJIC 1.00; J.A. 38. Further, the jury was instructed to accord the defendant a presumption of innocence. CALJIC 2.90; J.A. 49. As this Court recognized in *Taylor v. Kentucky,* 436 U.S. 478, 485-86 (1978), the "purging" effect of such an instruction helps safeguard the accused's right to be judged solely on the evidence at trial. In addition, the jury was instructed not to be influenced by "pity" or "prejudice," or by "sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." CALJIC 1.00; J.A. 39. And they were told to consider all these instructions "as a whole and . . . to regard each in the light of all the others." CALJIC 1.01; J.A. 39.

2. *Moral Certainty as a Level of Certainty: The use of moral certainty in the instruction does not diminish the standard of proof beyond a reasonable doubt.*

Petitioner also makes the unusual claim that CALJIC 2.90's reference to "moral certainty" is invalid because it diminishes the high degree of certainty required to convict under the beyond-a-reasonable-doubt standard. (Pet'r's Br. 17-21.) Again, in pressing this attack,

petitioner seeks to treat the phrase "moral certainty" in isolation, divorced from its context in the challenged California instruction. And, again, he cannot be allowed to do so. *Boyde*, 494 U.S. at 380-81; *Naughten*, 414 U.S. at 146-47. CALJIC 2.90 provides the context:

> Reasonable doubt is defined as follows: It is not a mere possible doubt . . . . *It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in the condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.*

This instruction is fully consonant with the policy that underlies the reasonable doubt rule itself. As reflected in the holding of this Court in *In re Winship*, 397 U.S. 358 (1970), which first recognized the constitutional status of the beyond-a-reasonable-doubt standard, proof of criminal convictions requires a standard that "'impresses on the trier of fact the necessity of reaching a *subjective state of certitude of the facts in issue.*'" *Id.* at 364 (emphasis added). Such a standard must surpass any lesser standard that is "'susceptible to the misinterpretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to *its effect in convincing his mind of the truth of the proposition asserted.*'" *Id.* at 367-68 (emphasis added); *see Addington v. Texas*, 441 U.S. 418, 423 (1979) (the function of standards of proof under the Due Process Clause is to instruct the factfinder concerning *the degree of confidence our society thinks he should have* in the correctness of his factual conclusions); *see also Jackson v. Virginia*, 443 U.S. 307, 330 (1979) (Stevens, J., concurring) (reasonable

doubt standard sets burden of proof "regarding the *subjective state of mind* that persons charged with the responsibility of evaluating the credibility of evidence must possess before they find the defendant guilty . . . .") (emphasis added). The California instruction emphasizes the solemnity of the juror's decision to find a criminal defendant guilty and the especially high degree of subjective certainty required to sustain a verdict of guilt.

It is hard to imagine, first, how any instruction requiring a criminal conviction to be founded only upon the jurors' "certainty" -- regardless of what kind of category of certainty -- can plausibly be said to ease the prosecution's burden of proving guilt beyond "reasonable doubt." The word "certainty," unaccompanied by any quantifying adjective that might work to minimize the required level of certainty, can hardly present an unacceptable likelihood that jurors will not only misunderstand it but misunderstand it in a way that reduces the prosecution's burden.

Nor is there anything in the phrase "moral certainty" that would suggest a reduction, rather than an intensification, of the certainty requisite under the instruction or of the prosecution's duty to prove guilt beyond reasonable doubt. One who is morally certain of the "truth of the charge" is not *less* certain of it than one who is simply described as certain. The word "moral" in this context does not operate to minimize any level of certainty. Quite differently, it describes an especially strong kind of subjective certainty that reflects a deeply important personal decision. It emphasizes the solemnity of the decision a juror makes when he determines a defendant's criminal culpability. In doing this, the instruction serves the purpose of the reasonable doubt rule and does not detract from it.

This Court itself recently used the very phrase "moral certainty," in a commonsense and natural way that illustrates the extraordinarily high degree of certainty use of the phrase conveys. In *Canton v. Harris,* 489 U.S. 378, 390 n.10 (1989), this Court stated: "[C]ity policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons." *See also Walker v. City of New York,* 974 F.2d 293, 297, 300 (2d Cir. 1992) (district attorneys know to a "moral certainty" that their trial prosecutors sometimes will find themselves in possession of exculpatory *Brady* evidence). No criminal defense lawyer would object to an instruction that the prosecution was bound to prove guilt to an elevated degree of certainty comparable to that ascribed to the city policymakers in *Harris.* As reflected in this Court's own use of the phrase in that case, moral certainty connotes the highest degree of certainty.

Petitioner, as noted above, cites dictionary definitions[4] and examples of contemporary usage of the phrase "moral certainty" from newspapers and magazines. (Pet'r's Br. 25-30.) Through these citations, of course, he means to support his separate assertion that people

4. One cannot rely purely on dictionaries, of course, to provide definitive statements of the meanings jurors ascribe to words and phrases employed in jury instructions. "Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among [various standards of proof] or the nuances of a judge's instructions on the law may well be largely an academic exercise . . . ." *Addington v. Texas,* 441 U.S. 418, 424 (1979). But it is nevertheless noteworthy that "moral" and "moral certainty" have been defined in dictionaries as indicating heightened rather than diminished certainty. "Moral certainty" itself has been defined as "probability so great that no reasonable doubt is possible." Oxford American Dictionary 432 (1980 ed.). (Pet'r's Br. 25 n. 18.)

often use the phrase to convey beliefs founded on sources other than empirical evidence. *See supra* p. 15. But the striking, albeit unintended, effect of petitioner's citations, in the context of this novel level-of-certainty argument, is to confirm that people commonly use the phrase "moral certainty" to denote their thorough and utter conviction that a given proposition is true. Still less do those citations imply that people would interpret "moral certainty" as suggesting an inferior level of certainty when they are asked to achieve "an abiding conviction, to a moral certainty," before returning a verdict of criminal guilt in solemn judicial proceedings.

In any event, petitioner's fixation on the isolated phrase "moral certainty" ignores the larger picture. The California instruction requires something more than the "moral certainty" treated in isolation by petitioner. CALJIC 2.90 affords the jurors guidance on reasonable doubt by likening it to an inability to attain "an *abiding conviction,* to a moral certainty, *of the truth of the charge.*" "Abiding" means "settled and fixed," *Hopt v. Utah,* 120 U.S. at 439, and "strongly" and "deeply" held, *People v. Brigham,* 599 P.2d 100, 104 (Cal. 1979). And surely there is nothing in the word "conviction" that connotes anything but the highest degree of certainty. "Abiding conviction" language thus helps assure that, by emphasizing the high degree of the juror's conviction and certainty in "the truth of the charge," the instruction is conforming with the policy behind the reasonable-doubt rule rather than undermining it. *Lanigan v. Maloney,* 853 F.2d 40, 43, 47 n. 4 (1st Cir. 1988); *Ex parte Adkins,* 600 So. 2d 1067, 1071 (Ala. 1992).

Not even petitioner claims that "abiding conviction" language tends to suggest a standard incompatible with the constitutional one. Even he grudgingly acknowledges

that phrase at least informs the jurors they must be "very sure." (Pet'r's Br. 17.) So, instead, he tries to avoid the phrase's pro-defense effect by reading it out of the text of the instruction entirely. In petitioner's strange view of the text, "'abiding conviction' does not have any independent effect in conveying the standard of proof. [I]t simply indicates that the trier of fact must be very sure that the standard of proof, otherwise defined [as moral certainty], has been met." (Pet'r's Br. 17.) But it is useless for petitioner to deny the literal wording and structure of the instruction. The instruction explicitly equates the absence of reasonable doubt, not just with "moral certainty," but with "an abiding conviction, to a moral certainty, of the truth of the charge" based on all the evidence. The instruction does not simply require, as petitioner says, that the jurors be "very sure" that some variable standard of proof has been met. It requires them to be deeply and lastingly sure (abiding conviction) of the "truth of the charge," and requires that this "conviction" itself attain the highest level of certitude (moral certainty). The linking of "abiding conviction" and "moral certainty" properly emphasizes the high degree of proof needed to convict. *Lanigan*, 853 F.2d at 47 n.4. It implies that the determination of proof beyond a reasonable doubt requires an intensified and heightened degree of subjective certainty. The California reasonable doubt instruction is in accord with the mandate of *Winship*, for it reflects the need for subjective certainty.

Outside the particular context of the Louisiana instruction disapproved in *Cage*, this Court has upheld, against a claim that it erroneously defined reasonable doubt, an instruction containing the statement that "'[p]roof beyond a reasonable doubt is such as will

produce *an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist,* so that you feel certain that it exists.'" *Miles v. United States,* 103 U.S. 304, 309, 312 (1881) (emphasis added); *see also Wilson v. United States,* 232 U.S. 563, 570 (1914). The similarity with the California instruction in this regard -- "an abiding conviction, to a moral certainty, of the truth of the charge" -- is obvious.[5]

And, in the modern era, many courts continue to approve the use of "moral certainty" in jury instructions as descriptive of the subjective state of mind requisite to a jury determination of the defendant's guilt "beyond a reasonable doubt." Federal courts have done so. *E.g., Lanigan v. Maloney,* 853 F.2d at 47 n.4 (1st Cir.); *Hatheway v. Secretary of Army,* 641 F.2d 1376, 1384 (9th Cir. 1981); *Young v. Anderson,* 513 F.2d 969, 972 (10th Cir. 1975); *United States v. Smaldone,* 485 F.2d 1333, 1348 (10th Cir. 1973); *see also United States v. Russell,* 971 F.2d 1098, 1109 (4th Cir. 1992) (suggesting "moral certainty" is either redundant or implies a level of proof even greater than beyond a reasonable doubt). And state courts in California and at least seventeen other jurisdictions elsewhere have done so. *E.g., Ex parte*

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5. This Court in *Hopt v. Utah,* 120 U.S. at 440, indicated that equating "beyond a reasonable doubt" with "reasonable and moral certainty" was redundant. California's language is, of course, quite different, particularly in avoiding any suggestion that only "reasonable" certainty is required to convict. Even if California's instruction were deemed redundant, however, it could hardly be said to be unconstitutional for such a trivial reason. As this Court determined in *Hopt,* an instruction containing the "moral certainty" phrase, as well as others challenged by the defendant, might be "open to criticism" but could not have misled the jury in an unconstitutional way. 120 U.S. at 440-41.

McWilliams, 1993 Ala. LEXIS 316 at *29-32 (Mar. 19, 1993); *Stewart v. State,* 601 So. 2d 491, 505 (Ala. Crim. App. 1992); *Ellis v. State,* 356 S.W.2d 426, 429 (Ark. 1962); *People v. Jennings,* 807 P.2d 1009, 1041-42 (Cal. 1991); *Egantoff v. State,* 208 So. 2d 843, 845-846 (Fla. App. 1968); *Hicks v. State,* 425 S.E.2d 877, 878 (Ga. 1993); *Bradford v. State,* 412 S.E.2d 534, 536 (Ga. 1992); *State v. Bush,* 569 P.2d 349, 350-51 (Haw. 1977); *State v. Rhoades,* 822 P.2d 960, 979-80 (Idaho 1991) (adopting California's reasonable doubt instruction as the only appropriate one); *State v. Franklin,* 163 N.W.2d 437, 441 (Iowa 1968); *State v. Wilkins,* 523 P.2d 728, 735 (Kan. 1974); *Commonwealth v. Dinkins,* 615 N.E.2d 570, 575 (Mass. 1993); *People v. Turner,* 298 N.W.2d 848, 852 (Mich. App. 1980); *State v. Morley,* 474 N.W.2d 660, 669-70 (Neb. 1991); *Lee v. State,* 813 P.2d 1010, 1011 (Nev. 1991); *City of Minot v. Rubbelke,* 456 N.W.2d 511, 514-15 (N.D. 1990); *Commonwealth v. Banks,* 311 A.2d 576, 581 (Pa. 1973); *State v. Caruolo,* 524 A.2d 575, 583 (R.I. 1987); *State v. Brewer,* 197 N.W.2d 409, 411 (S.D. 1972); *Hardin v. State,* 355 S.W.2d 105, 108 (Tenn. 1962); *Marshall v. State,* 528 S.W.2d 823, 825 (Tenn. Crim. App. 1975); *see also People of Territory of Guam v. Yang,* 800 F.2d 945 (9th Cir. 1986) (territorial statute importing California's reasonable doubt instruction); *Rivett v. State,* 578 P.2d 946, 949-950 (Alaska 1978); *State v. Donovan,* 419 A.2d 1102, 1105-1106 (N.H. 1980); *State v. Wilkerson,* 291 A.2d 8, 11-12 (N.J. 1972); *People v. Rawlins,* 569 N.Y.S.2d 635, 638 (App. Div. 1991) (circumstantial evidence instruction); *Bowen v. State,* 715 P.2d 1093, 1097-1098 (Okla. Crim. App. 1984) (same); *State v.*

Flores, 566 P.2d 1281, 1282-1283 (Wash. App. 1977).[6]

Courts that criticize "moral certainty" language also recognize that the reference, notwithstanding its alleged deficiencies, does not diminish the prosecution's burden of proof and thus does not render the instruction unconstitutional. Among the cases petitioner cites in his brief on the "moral certainty" question, none invalidates a reasonable doubt instruction on constitutional grounds.[7] (Pet'r's Br. 20-21.) Moreover, to the extent

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6. Even in jurisdictions that for whatever reason no longer refer to "moral certainty" in their instructions, courts in the modern era have recognized the validity of the formulation or discerned in the phrase a special additional guarantee protective of the reasonable-doubt standard. *E.g., State v. Cage,* 554 So. 2d 39 (La. 1989) (reversed by this Court on other grounds, as argued above, in *Cage v. Louisiana*); *State v. Williams,* 828 P.2d 1006, 1018-21 (Or. 1992) (reference to "moral certainty" not invalid under *Cage,* and may convey the idea to the jury that absolute certainty is required or mitigate the impact of other wording that might have lessened the state's burden of proof); *State v. Seneff,* 435 N.E.2d 680, 684-685 (Ohio App. 1980).

7. In *Perez v. Irwin,* 963 F.2d 499 (2d Cir. 1992), "moral certainty" was used in an opposite way from its use in California. In *Perez,* the instructions equated "reasonable doubt" with "doubt to a moral certainty" rather than with proof to a moral certainty. *Id.* at 501. "By using the expression in this fashion the trial court placed the burden of the moral certainty requirement on the defendant rather than on the prosecution." *Id.* at 502. In *United States v. Del Toro Soto,* 676 F.2d 13, 17 (1st Cir. 1982), the federal court found no constitutional error in "moral certainty" language.

In *State v. Manning,* 409 S.E.2d 372, 374-75 (S.C. 1991), the court found the reference to "moral certainty" might allow the jurors to base a guilty verdict on subjective feeling rather than the evidence, but found the criticism insufficient to give rise to a constitutional violation. In *People v. Hewlett,* 519 N.Y.S.2d 555, 557 (App. Div. 1987), the instruction contained the glaring error of

petitioner's cited cases criticize "moral certainty" language at all, they do not do so on petitioner's unique theory that the phrase signals a diminution of the constitutional standard of proof.

Contrary to petitioner's position, criminal defendants often argue that it is the *omission* of the phrase "moral certainty" in a reasonable doubt instruction, rather than its inclusion, that renders the instruction erroneous. *E.g., People v. Palumbo,* 555 P.2d 521, 525 (Colo. 1976); *State v. Butler,* 543 A.2d 270, 278 (Conn. 1988); *People v. Simmons,* 95 N.E.2d 477, 481 (Ill. 1950); *Bieghler v. State,* 481 N.E.2d 78, 95 (Ind. 1985); *State v. Finnegan,* 237 N.W.2d 459, 460 (Iowa 1976); *Hockenbury v. Commonwealth,* 565 S.W.2d 448, 451 (Ky. 1978); *State v. Udstuen,* 345 N.W.2d 766, 768 (Minn. 1984); *State v. Schmeig,* 322 N.W.2d 759, 760 (Minn. 1982); *State v. Olkon,* 299 N.W.2d 89, 105 (Minn. 1980); *Allman v. State,* 571 So. 2d 244, 252 (Miss. 1990); *Watson v. State,*

defining the required degree of certainty not simply as moral certainty, but as a mere "reasonable degree of certainty."

Petitioner's citation to *Lanigan v. Maloney,* 853 F.2d 40, is obviously misplaced. The opinion in that case, if anything, applauded the "moral certainty" language and condemned instead the significant nullification of it -- "*a degree of* moral certainty -- reflected in the instructions in that case. *Id.* at 47 n.4. Also odd is petitioner's reliance upon *People of Territory of Guam v. Yang,* 800 F.2d 945 (9th Cir. 1986). There, the majority opinion allowed a departure from Guam's legislatively-mandated California-style instruction without expressing any opinion about the validity of the California instruction at all, *id.* at 947; and the dissenting opinion, quoted in petitioner's brief, took the position that it was the *departure* from the statutorily-adopted California-type instruction, not adherence to it, that amounted to error, *id.* at 950-51 (Ferguson, J., dissenting). Further, the dissent never indicated that the Ninth Circuit was "inclined" to reject the "moral certainty" language.

521 So. 2d 1290, 1295-1296 (Miss. 1988); *State v. Lane,* 244 A.2d 108, 109 (N.J. 1968); *State v. Watson,* 240 S.E.2d 440, 446 (N.C. 1978); *City of Minot v. Rubbelke,* 456 N.W.2d 511, 513 (N.D. 1990); *State v. Castrejon,* 856 P.2d 616, 618 (Or. 1993); *State v. Pratt,* 853 P.2d 827, 836 (Or. 1993); *State v. Bult,* 351 N.W.2d 731, 736-37 (S.D. 1984); *State v. Johnson,* 774 P.2d 1141, 1146 (Utah 1989) (defendant argued for reasonable doubt instruction virtually identical to that of California); *State v. Tanzymore,* 340 P.2d 178, 179 (Wash. 1959); *see also, Russell,* 971 F.2d at 1109; *State v. Harris,* 481 P.2d 504, 508 (Ariz. 1971); *Roberts v. State,* 620 P.2d 425 & n.1 (Okla. Crim. App. 1980); *Commonwealth v. Banks,* 311 A.2d 576, 581 (Pa. 1973); *State v. Bernal,* 330 N.W.2d 219, 220-221 (Wis. App. 1983). Defense manuals, also, in apparent recognition that "moral certainty" language protects the defense, suggest ways for trial lawyers to emphasize that language to the defendant's advantage.[8/]

8. For example, two well-known defense lawyers recommend that their colleagues at the defense bar argue to juries along these lines:

> "Reasonable doubt is a real doubt -- real as distinguished from imaginary -- which an honest juror will have after considering all the circumstances of the case. You as a juror, must be able to say, *'I am morally certain of the accused's guilt.'*
>
> *"Moral certainty, however, does not necessarily mean absolute certainty. In our daily affairs we constantly act on probabilities and we seldom act on moral certainty. But it is elementary that you can never convict simply because you think the accused is probably guilty. You must say that he is really guilty, and of that you are morally certain."*

F. Lee Bailey & Henry B. Rothblatt, *Successful Trial Techniques for Criminal Trials,* § 20:6 at 471 (2d ed. 1985) (emphasis added).

Another defense manual offers as a standard the jury argument

In fact, in this case, petitioner's trial counsel repeatedly made beneficial use of the very instructions petitioner now challenges in this appeal. The defense, arguably, manipulated the instruction to suggest that it imposed a burden of proof on the prosecution even higher than "beyond a reasonable doubt." Defense counsel repeatedly told the jurors to make a decision that not only satisfied their consciences, but one that they could live with for the rest of their lives.[9/] As

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of defense attorney Leonard Weinglass in a case called *People v. Skyhorse:*

> "That is the attitude you should have in the presumption of innocence. You would be of a mind set that resists this accusation, that has disbelief in it. That insists that proof, solid proof, quality proof be given you that would enable you to have *a moral conviction to an abiding certainty* of guilt.
>
> . . . .
>
> ". . . [I]f at the end of this case you have a suspicion of guilt or you think there's a possibility of guilt, or even a probability of guilt, under the law that the court will give you, you cannot vote for a guilty verdict unless you have *an abiding conviction to a moral certainty of guilt, which transcends and is much beyond the question of possibility, probability, a maybe, a perhaps, and speculation.*"

6 Abraham P. Ordover, *Criminal Law Advocacy, Argument to the Jury*, ¶ 5:08 at 5-99, 5-101 (1993) (emphasis added).

9. During the voir dire of the jury, the defense attorneys repeatedly discussed the prosecution's high burden of proof:

> If, for example, ... [y]ou just have a gut feeling that maybe he is involved. Maybe he did it, but you didn't hear something to really convince you *beyond a reasonable doubt and to a moral certainty.* Are you going to let that gut feeling or that intuition take over or will you require the rules of the court to be met?

(Rep.'s Tr. 2044; J.A. 29-30 (emphasis added).)

> Now when I ask that, in other words, there is a burden of proving a case beyond a reasonable doubt and to a *moral certainty* in each and every criminal case.

(Rep.'s Tr. 2047; J.A. 31 (emphasis added).)

> Now would you have any difficulty in requiring the prosecutor to meet the burden of proof as prescribed by law? In other words, to prove the truth of these charges beyond a reasonable doubt and to a *moral certainty*?

(Rep.'s Tr. 2056; J.A. 31 (emphasis added).)

> If, after he rested and we rested, you were not convinced beyond a reasonable doubt and to a *moral certainty in your heart*, would you be able to vote not guilty?

(Rep.'s Tr. 2057; J.A. 32 (emphasis added).)

> Now when we talk about the presumption of innocence, that's a legal presumption that everyone, including you and everyone else in this room has that you are legally presumed to be innocent until the contrary is proven beyond a reasonable doubt and to a *moral certainty.*

(Rep.'s Tr. 2207; J.A. 32-33 (emphasis added).)

Petitioner also emphasized the "moral certainty" language of the California reasonable doubt instruction during final argument:

> The prosecution has the burden of proof. And again, you have to look at this burden of proof and what is reasonable doubt. It's not a mere possible doubt. Anything can be possible. The moon could be made out of blue cheese, I guess. I guess not. We have been there. It cannot be.
>
> *What we're talking about is an abiding conviction to a moral certainty of the truth of the charge.* I am not sure what that means exactly. I guess that you kind of know it when you see it. Do I have a doubt? Is that doubt reasonable? That is the question you have to ask.

(Rep.'s Tr. 5385-86; J.A. 79 (emphasis added).)

> Do I have a doubt and is that doubt reasonable? Going down the line to each and every charge and each and every element of each and every charge. Do I have *an abiding conviction?* This is what you ask yourself.

noted by now-Chief Justice Rehnquist in his dissenting opinion in *Cool v. United States,* 409 U.S. 100, 107

> Reasonable doubt is the state of the case which after the entire comparison and consideration of all the evidence leaves your minds in the condition that *you cannot say you feel an abiding conviction to a moral certainty of the truth of the charge. An abiding conviction, abide. To live with. Abode. Comes from the word "house." Abode. To live with. You live in your house.*
>
> Do I have *an abiding conviction to a moral certainty of the truth of the charges?* You have to think about when you go in, and do I have a doubt and is the [sic] reasonable, about what that means. Something that has to stay with you.
>
> If you go in and vote on a conviction, let's say second degree murder, manslaughter, the park charges October 14th and next week or next month or even next year, you think you have been thinking about it on and off. You say, you know, I really do have a doubt. The more I think about it, I have a doubt. Reasonable doubt. You know, I have doubts about this case. Well, then it hasn't lived with you. *The strength of your conviction to a moral certainty hasn't lived with you, an abiding conviction to a moral certainty. That's what the standard is.*

(Rep.'s Tr. 5392-93; J.A. 84 (emphasis added).)

> *If, after a consideration of all of the evidence, you have a reasonable doubt that the defendant was present at the time the crime was committed, he is entitled to an acquittal.*
>
> . . . .
>
> *Now something else that I think was touched upon by [defense attorney] Seymour that it's a decision when you say beyond a reasonable doubt and to a moral certainty. That means forever. That doesn't mean just today or the mood you are in today. That means a decision that you are going to live with forever. And it's probably, if not the most important decision you will ever make, certainly way up there on the list.*

(Rep.'s Tr. 5539; J.A. 85-86 (emphasis added).)

(1972), "If the nuance of the instruction upon which reversal is now based did not suggest itself to petitioner's trial counsel, it seems doubtful that it suggested itself to the jury either . . . ." Since petitioner's trial counsel in this case clearly recognized the pro-defendant benefit afforded by the "moral certainty" language in the California instruction, and used it to his advantage, it is doubtful any improper anti-defendant nuance suggested itself to the jury in this case.

b. Moral Evidence.

Petitioner next challenges the reference in CALJIC 2.90 to "moral evidence." (Pet'r's Br. 30-31.) This phrase, however, plays a relatively minor role in the California instruction, nowhere operating as any description or analogy for the concepts of reasonable doubt or proof beyond a reasonable doubt themselves.

As is invariably true, the context of the phrase shows how jurors likely understood it. Here, the instruction states: "Reasonable doubt is . . . not a mere possible doubt; *because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt.*" In CALJIC 2.90, then, it is immediately apparent that "moral evidence" does not purport to describe in any way the jury's possible degrees of certainty or uncertainty about the defendant's guilt or innocence at all. "Moral evidence" simply describes the kind of fallible evidence with which jurors are naturally confronted, and the sentence in which it appears merely states the virtual truism that proof of human events carries some inherent fallibility. *See Hopt v. Utah,* 120 U.S. at 441 ("the uncertainty that attends all human

evidence").[10/]

Petitioner nevertheless suggests that phrases like "moral evidence" are anachronisms without meaning to a modern jury. Even if this were true, it would not help petitioner make out his due process claim; for, if the phrase is meaningless, it could hardly be said that it is likely to diminish the true burden of proof. *See Holland,* 348 U.S. at 140; *Hopt,* 120 U.S. at 441. But petitioner's suggestion really is not true at all. The meaning of the phrase "moral evidence," anachronism or not, becomes readily discernable from its context in the very sentence in which it appears. That sentence almost self-consciously explains what it means by "moral evidence."

Petitioner also asserts that the references to "moral evidence," and perhaps to "moral certainty," somehow will be taken by the jurors as an invitation to find a defendant guilty because of their personal views of the morality of his conduct. (Pet'r's Br. 30-31.) First, however, petitioner again ignores totally the explanatory context in which these challenged phrases appear in CALJIC 2.90. As used in the instruction, the phrase merely denotes the potential fallibility of perception-limited and recollection-limited courtroom proof. It therefore does not call the jury's attention to any particular kind of "evidence" distinct in any way from the

10. This meaning is generally consistent with dictionary definitions. "Moral" has been defined, for example, as "[b]ased on a probability or on a general knowledge of human nature rather than on objective evidence or clear demonstration." *Standard College Dictionary* (Sidney I. Landau et al. eds., Funk & Wagnalls 1973). But, as with the challenged instructions in general, the best indicator of the meaning imparted to the jurors lies in the context of the language of the instruction. Here, the context makes the meaning discernable.

entirety of the evidence in the case.[11/]

Petitioner's complaint that "moral evidence" might be mistaken for "character evidence" is a non sequitur. First, the complaint is not germane to the Question Presented, which concerns the standard of proof, and not the admissibility or proper uses of character evidence. Second, even if it were interpreted to mean that, nothing in the way the term is employed in CALJIC 2.90 would suggest that character evidence was being specially recommended for the jury's consideration, for the instruction acknowledges the *limitations* of "moral evidence" instead. Third, where evidence bearing on a person's character is actually received in a criminal case -- either to show the defendant's character when it itself is a material issue or to show circumstantially some other material fact -- there is nothing wrong with the jury considering such evidence in arriving at a verdict.

Besides, other standard instructions reinforced the notion that the jurors were not to let their personal views of the morality of petitioner's conduct influence their verdict. The jurors were instructed that their duty was, instead, "to apply the rules of law that I state to you to the facts as you determine them and in this way to arrive at your verdict." CALJIC 1.00; J.A. 39. Those

11. Nor does "moral certainty" suggest any judgment of the defendant's morality rather than his factual guilt. The instruction does not relate to the defendant's conduct; instead, the phrase clearly employs "moral" as a description of the kind of certainty the juror must possess to convict. The California instruction requires the juror to have an abiding conviction to a moral certainty "*of the truth of the charge,*" based on the evidence. The instruction in its entirety therefore in no way implies, as petitioner indicates, that the jurors instead need be "certain" in any way of the "moral" nature of the defendant and his actions.

rules of law included the judge's instructions describing, not moral and religious factors, but the legal elements of the crimes charged against petitioner; and the instructions expressly required the jurors to find those elements to exist as a prerequisite to a guilty verdict. CALJIC 8.10; J.A. 50 ("In order to prove the commission of the crime of murder, each of the following elements must be proved . . . ."). Thus, when the entire corpus of the instructions is properly viewed as a whole, it cannot be said that it is reasonably likely that petitioner's jurors based their verdict on religious or moral beliefs rather than upon the factual evidence and the applicable law.

In sum: "moral evidence" plays a minor and non-controversial role in CALJIC 2.90; its meaning is self-explanatory from the context in which it appears; it does not threaten any misuse of character evidence; and, most important, its function in the instruction is extremely remote from describing the prosecution's burden of proof beyond a reasonable doubt. It is not "reasonably likely" that the jurors misunderstood the term in any way that would have lightened that burden of proof.

c. Not A Mere Possible Doubt.

Petitioner, last, attacks the following language from CALJIC 2.90 as further destructive of a proper understanding of the concept of proof beyond a reasonable doubt: "Reasonable doubt . . . is *not a mere possible doubt; because everything relating to human affairs,* and depending on moral evidence, *is open to some possible or imaginary doubt.*" (Pet'r's Br. 21-24.) He claims that it overstates the level of doubt that requires an acquittal to the point of requiring the jurors

to be satisfied that a defendant is probably innocent. Under this instruction, he says, "the jury is all too likely to understand the magnitude of a reasonable doubt necessary to acquit as the functional equivalent of 'an actual substantial doubt' or a 'grave uncertainty.'" (Pet'r's Br. 22, footnote omitted.)

At a threshold level, the challenged instruction's capacity to mislead on the question of proof beyond a reasonable doubt appears limited. The challenged language does not purport to describe, as a direct substitute or as an analogy or as a simile, either the standard of proof or reasonable doubt itself. It functions instead at a subordinate level: that of assisting in the statement of the obvious non-controversial truth that all things relating to human affairs and subject to retrospective courtroom proof are open to possible or imaginary doubt. The challenged language thus addresses itself primarily to a function different from stating the burden of proof.

At that level, moreover, the instruction functions correctly. By first distinguishing reasonable doubt from "mere possible" or "imaginary doubt," and also equating "mere possible doubt" with "imaginary doubt," the instruction in no way implies that a defendant's innocence must be probable in order to require acquittal. The instruction does not say that doubt based upon a possibility cannot be reasonable. Instead, it properly signals that not every imaginable, remote, and speculative doubt automatically constitutes reasonable doubt. *Lanigan v. Maloney,* 853 F.2d 40, 43 (1st Cir. 1988). Jurors, as far as respondent is aware, are not required by the Constitution to acquit every time the defendant offers a physically possible exculpatory version of the material facts -- *e.g.,* every time he offers an alibi or

every time the testimony of witnesses conflict. Instead, the jurors must determine if the possibility of innocence is such as to create in their minds a reasonable doubt of guilt.

Completely demonstrable or objective certainty is not required for proof beyond a reasonable doubt, and reasonable people may differ about whether reasonable doubt exists in a given case. *See Jackson v. Virginia,* 443 U.S. 307, 313, 326 (1979). The inability to adduce absolute proof in matters subject to courtroom evidence is the essence of the reasonable-doubt problem that confronts every jury. It is because of the insistence that jurors must be extraordinarily certain of guilt – notwithstanding the human inability to prove criminal guilt with mathematical certainty – that reasonable doubt instructions may speak of "certainty" short of mathematical certainty, or "certainty" in the face of merely unreasonable doubt, without being subject to criticism as internally inconsistent.

Petitioner's claim that the jury might equate the phrase "possible doubt" with an "actual substantial doubt" or a "grave uncertainty" is without merit. The jury in *Cage* was instructed that a reasonable doubt is not a mere possible doubt. 498 U.S. at 40. However, this Court did not find the "possible doubt" language in the *Cage* instruction problematic, and this Court certainly did not equate the "possible doubt" language with the terms "actual substantial doubt" and "grave uncertainty."

Further, the California instruction (1) ensures that, before returning a verdict of guilt, jurors must be convinced beyond a reasonable doubt, and (2) illustrates reasonable doubt as "that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition

that they cannot say they feel *an abiding conviction, to a moral certainty, of the truth of the charge.*" It is not likely that, even if the "mere possible doubt" and "imaginary doubt" language were susceptible to the wooden interpretation petitioner constructs for it, the jurors in his case felt they had attained that high degree of conviction even though they actually doubted the defendant's guilt.[12]

* * *

Petitioner at the beginning of his brief calls CALJIC 2.90 a "jurisprudential dinosaur." (Pet'r's Br. 6.) It is not surprising, however, that petitioner would mischaracterize the instruction in that way: he is like the blindfolded man who cannot recognize an elephant when restricted to touching separately its trunk, its tusks, and its tail. Because he refuses to comprehend CALJIC 2.90 in its entirety, and in connection with surrounding instructions, he cannot reliably characterize it any way at

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12. Petitioner's reliance upon *State v. Chavarria*, 1993 Ariz. App. LEXIS 165 (Aug. 19, 1993) and *State v. Williams*, 828 P.2d 1006, 1019 (Or. 1992) is misplaced. Neither case supports petitioner's claim that the "possible doubt" language renders a reasonable doubt instruction constitutionally defective. Moreover, *Williams* specifically found the jury could not reasonably have construed the "possible doubt" language either to decrease the state's burden of proof or to allow the jury to base its decision on anything other than the evidence. *Williams*, 828 P.2d at 1019. And it is not clear that *Chavarria* is persuasive authority even in its own jurisdiction, for two other appellate panels in Arizona have declined to follow its critique of the Arizona instruction. *State v. Varela*, 1993 Ariz. App. LEXIS 226 at *20 (Oct. 5, 1993); *State v. Duzan*, 1993 Ariz. App. LEXIS 58 at *19 (Apr. 13, 1993).

all.

His attempt to show the instruction is unconstitutional, for that same reason, was doomed from the start. None of petitioner's criticisms of the three challenged phrases in CALJIC 2.90 makes sense when those phrases are considered in the explanatory context of the instruction. And none would make sense to jurors properly instructed, like the jurors in petitioner's case, to consider the instructions as a whole in the solemn context of a criminal trial. Petitioner has not carried his burden of demonstrating that – whatever deficiencies might inhere in the instruction – it is reasonably likely the jurors in his case actually misunderstood CALJIC 2.90 to allow a verdict of guilt based on anything less than their subjective certainty that the evidentiary proof established petitioner's guilt beyond a reasonable doubt. Instead, the instruction provides appropriate guidance emphasizing the high degree of certainty the Constitution requires to justify a criminal conviction. California's standard reasonable-doubt instruction, therefore, cannot be condemned as unconstitutional.

II. Any Invalidation of the California Instruction Should Apply Only Prospectively.

In California, CALJIC 2.90 is given to the jury in the exact wording of the pattern instruction in virtually every criminal case. *See People v. Brigham,* 599 P.2d 100, 104 (Cal. 1979) (warning that most instructions on reasonable doubt that "'step outside of well-established bounds'" are found to be erroneous). And, under California law, the instruction may be challenged on appeal even absent an objection at trial. Cal. Penal Code § 1259. In fact, all

six of California's Court of Appeal districts have issued orders deeming the issue in this case raised and rejected in all pending appeals. (Appendix.)[13] If a judgment is reversed, then California Penal Code section 1382 would require retrials within 60 days of the remittitur being issued on appeals from superior court judgments, and within 30 days on appeals from municipal court judgments.

If the California reasonable doubt instruction is found to violate due process in this case, it would be appropriate for this Court to determine if this ruling should be applied to this case and to other cases not yet final on appeal. *See Teague v. Lane,* 489 U.S. 288, 300 (1989) (plurality opinion) (Part IV (A)) ("In our view, 'the question whether a decision announcing a new rule should be given prospective or retroactive effect should be faced at the time of that decision'").

The current standard of retroactivity for non-final cases was established in *Griffith v. Kentucky,* 479 U.S. 314, 328 (1987): "[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all

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13. The Judicial Council of California's most recent Annual Report on Judicial Statistics discloses that 7,250 notices of appeal were filed in criminal cases from superior court judgments in fiscal year 1991-92. Judicial Council of California, 1993 Annual Report, Volume II, p. 25. This figure does not include appeals in juvenile delinquency cases or misdemeanor appeals resolved in the appellate department of state superior courts. The Report shows that a total of 154,617 superior court defendants had their criminal cases resolved in fiscal year 1991-92. *Id.,* p. 61. According to the Capital Case Coordinator of the California Attorney General's Office, there now are at least 214 non-final capital cases where the challenged instruction presumably was given.

cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."

The *Griffith* standard for non-final cases and the *Teague* standard for final cases are this Court's latest pronouncements on general standards for retroactive applications of new rules of criminal procedure. The federal Constitution itself neither prohibits nor requires retroactive application of a new rule, *see Griffith*, 479 U.S. at 320, and for some twenty years prior to *Griffith* and *Teague*, the three part analysis of *Linkletter v. Walker*, 381 U.S. 618 (1965), and *Stovall v. Denno*, 388 U.S. 293 (1967), controlled retroactivity issues in criminal cases. The *Linkletter/Stovall* standard applied to both non-final and final cases; retroactivity was determined on a case-by-case basis, depending on three factors: (1) the purpose to be served by the new rule; (2) the extent of reliance by law enforcement on the old rule; and (3) the effect on the administration of justice if retroactive application was allowed. *Stovall*, 388 U.S. at 300.

In 1982, a plurality of this Court concluded that the *Linkletter/Stovall* analysis should be "rethought" and adopted a new standard of retroactivity for Fourth Amendment cases. *United States v. Johnson*, 457 U.S. 537, 548 (1982). In 1987, a majority of this Court adopted the current *Griffith* standard for all non-final cases. 479 U.S. at 328.[14/]

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14. The *Griffith* rule has not received universal approval. One survey of retroactivity law concluded that *Griffith* is "too unbending" when considered in a remedial framework. The authors suggest a return to a *Linkletter/Stovall* analysis, to allow consideration of the unpredictability of the new rule; the nature and purposes of the rule; and the disruption of the administration of justice. Richard

Respondent realizes that *Griffith* was the product of this Court's long struggle to determine how to apply retroactivity principles. And respondent recognizes that, in adopting the *Griffith* rule, this Court intended to promote judicial integrity and ensure equal treatment of defendants in non-final cases by applying new decisions to all such cases. However, based on the unique circumstances of this case, respondent asks for an exception to *Griffith's* normal rule of retroactivity.[15/]

H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1731-1833 (1991).

15. An apparent exception to the *Griffith* rule has been created in Fourth Amendment exclusionary rule cases. Without mentioning *Griffith*, the majority opinion in *Illinois v. Krull*, 480 U.S. 340, 355 n.11 (1987), denied relief to the defendant even though, in his state court appeal, a state statute authorizing warrantless administrative searches was found to be unconstitutional. Recognizing the difference between the substantive Fourth Amendment right and the remedy of suppression, *see Krull*, 480 U.S. at 368 (O'Connor, J., dissenting), this Court's analysis nevertheless invoked considerations reminiscent of the *Linkletter/Stovall* standard -- *i.e.*, the deterrent purpose to be served by the new standards and the extent of reasonable reliance by law enforcement authorities on the old standards. Prior to *Johnson* and *Griffith*, exclusionary rule cases such as *Krull* were analyzed using the *Linkletter/Stovall* factors, with the distinction between remedy and constitutional right factored in the "purpose of the rule." *See United States v. Peltier*, 422 U.S. 531, 538 (1975) (discussing the focus of retroactivity cases on purposes served by the exclusionary rule). The effect of *Krull* was to deny the defendant, and others who suffered from the state's reasonable reliance on the unconstitutional statute, any benefit from the new rule, even if their convictions were not final when it was announced. *Krull's* apparent departure from *Griffith* is remarkable since *Johnson*, a pre-*Griffith* case, rejected the *Linkletter/Stovall* standard and held that, for Fourth Amendment cases, new decisons would be applicable to all non-final cases subject to the "clear break"

Any decision invalidating CALJIC 2.90 should apply only to defendants whose juries are instructed after the decision is announced, *see generally Krull,* 480 U.S. at 342-361; *Morrissey v. Brewer,* 408 U.S. 471, 490 (1972), or, at the most, only to petitioner and such defendants, *see Stovall,* 388 U.S. at 301.

Most important, if CALJIC 2.90 is unconstitutional, the error would exist in virtually every California case, for the identical instruction is expected to be given in every case. Application of *Griffith* and *Sullivan* would overturn every criminal conviction in thousands of non-final cases. The catastrophic effect on California's criminal justice system itself justifies an exception to *Griffith's* normal rule of retroactivity.

Further, petitioner concedes that at least until the mid-nineteenth century, reasonable doubt was correctly explained by using the terms "moral evidence" and "moral certainty." (Pet'r's Br. 5, 34.) Petitioner claims that this correct usage became incorrect at some unspecified time because the meaning of those phrases "changed dramatically during the past 150 years . . . ." *Id.* at 5; *see also id.* at 37. Therefore, if this Court condemns California's use of those phrases today based upon such gradual evolution of language usage, it would be impossible to determine exactly when the phrases somehow evolved from accurately describing reasonable doubt into unconstitutionally altering the burden of proof. Prospective application would not offend *Griffith's* concerns of judicial integrity and equal treatment of

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exception. *See Krull*, 480 U.S. at 368 (O'Connor, J., dissenting) (finding the Court's ruling "at right angles, if not directly at odds" with *Griffith*).

similarly situated defendants, for it is impossible to determine which defendants, petitioner included, actually suffered from constitutional error. In other words, in terms like those used by this Court in *Sullivan v. Louisiana,* it cannot be ascertained with confidence which defendants over time actually have suffered a "vitiation" of "all the jury's findings." 113 S.Ct. at 2082. Any invalidation of CALJIC 2.90 should apply only to defendants whose juries are instructed after the decision or, at most, only to petitioner and such defendants.

Another consideration favoring an exception to the *Griffith* rule is the historical development of this instructional issue. Although this Court has declared the reasonable doubt standard itself to be a necessary component of due process, it has allowed widely divergent views to develop among the states and federal circuits as to what and whether clarifying, explanatory or defining instructions might be given on the concept, without providing clear guidance toward achieving one consistent position. California's response was a statute on reasonable doubt and a related pattern jury instruction. California's instruction has been operative for decades with no indication by this Court that it was constitutionally infirm, even though other jurisdictions treated the issue differently. The state made a reasoned, good faith attempt to explain a concept that, so far, has resisted a single universally accepted definition and ultimately might be found to support more than one constitutionally acceptable definition. This is an especially compelling case because, by petitioner's own concession, the challenged phrases correctly defined reasonable doubt in the past.

Moreover, if the challenged California instruction is found unconstitutional, the question would remain as to

what language should be substituted to cure the infirmity. In view of the nationwide divergence on the propriety of such an instruction, a ruling that finds the instruction unconstitutional would not solve the state's problem in determining what instruction would pass constitutional muster. In the absence of clear guidance from this Court on what kind of clarifying language would survive constitutional challenge, California would be left to attempt yet another explanation of reasonable doubt. While it may be appropriate for this Court "to allow the various States to serve as laboratories in which the issue receives further study," *Teague*, 489 U.S. at 296, it would be extremely unfair to exact from the state the tremendous penalty of automatic reversals now and at the same time force the state to assume the same risk as it faces the problem of how to craft an appropriate reasonable doubt instruction for future cases. A narrow exception to *Griffith* is therefore justified in this unique situation.

Prospective application of this decision would not be unduly unfair to California defendants with non-final convictions, because the California instruction correctly and expressly stated the general proposition that guilt had to be established by proof beyond a reasonable doubt. The challenged "moral certainty" language has been used by California defendants, including petitioner, to suggest an increase, not decrease, of the prosecution's burden, as discussed above. The petitioner's lack of objection at trial to the California instruction, coupled with authorities previously cited which approved of the challenged California instruction, strongly indicate that the alleged infirmity was not so serious as to require, as

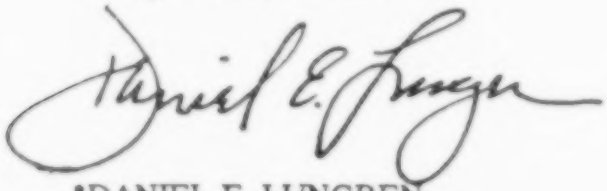
a matter of fundamental fairness, that all defendants with non-final convictions receive the benefit of automatic reversal under this decision.

Finally, respondent recognizes that retroactive application serves a purpose in overcoming an aspect of a criminal trial which "'substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials,' . . . ." *United States v. Peltier,* 422 U.S. at 535 (quoting *Williams v. United States,* 401 U.S. 646, 653 (1971)). However, the likelihood of an accurate conviction in this case and in past cases was not seriously diminished by the allegedly erroneous instruction. Defense attorneys in California have used the alleged infirmity in the "moral certainty" language in a manner that helps, not hurts, their clients, as previously demonstrated by citations to petitioner's jury voir dire and jury argument and by reference to defense manuals. A California jury in a criminal case consists of twelve members who are required to reach a unanimous verdict, although the federal Constitution does not require either that many jurors or unanimity. *See Apodaca v. Oregon,* 406 U.S. 404 (1972); *Williams v. Florida,* 399 U.S. 78 (1970). Considering these circumstances, the accuracy of guilty verdicts in this and past California trials, even given the allegedly erroneous instruction, is not so impugned as to demand retrospective application of this decision.

CONCLUSION

CALJIC 2.90, both on its own and in combination with other standard instructions, provided proper guidance to petitioner's jury on the issue of reasonable doubt. It is constitutional, moreover, for it is not reasonably likely that the jury interpreted it in derogation of the proper standard of proof. Last, any holding that CALJIC 2.90 is unconstitutional should be applied prospectively only. The California Supreme Court's judgment, upholding the conviction and death sentence, should be affirmed.

Respectfully submitted,



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APPENDIX

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

MISC. ORDER 93-1

THE COURT:

IT IS HEREBY ORDERED that in every criminal appeal pending before this court and not yet final from a judgment following a jury verdict, appellant shall be deemed to have challenged the constitutionality of CALJIC No. 2.90 based on Sandoval v. California, certiorari granted September 28, 1993, ___ U.S. ___ (Dock. No. 92-9049), and this court shall be deemed to have rejected that challenge on the ground that, pursuant to Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455, the court is bound by the California Supreme Court's resolution of the issue. (People v. Sims (1993) 5 Cal.4th 405, 457; People v. Sandoval (1992) 4 Cal.4th 155, 186; People v. Noguera (1992) 4 Cal.4th 599, 633-634; People v. Johnson (1992) 3 Cal.4th 1183, 1234; People v. Jennings (1991) 53 Cal.3d 334, 385-386.)

The purpose of this order is to ensure that this issue will be preserved for review after rendition of the decision in Sandoval v. California without the need for appellants in pending appeals to raise the issue in opening, reply or supplemental briefs or in petitions for rehearing on an individual basis.

Dated NOV 01 1993

/s/
Carl W. Anderson
Administrative Presiding Justice

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

SECOND APPELLATE DISTRICT

MISCELLANEOUS ORDER 11-9-93

THE COURT:

IT IS HEREBY ORDERED that in every criminal appeal pending before this court from a judgment following a jury verdict and not yet final, appellant shall be deemed to have challenged the constitutionality of CALJIC No. 2.90 (4th ed. 1979) as in Sandoval v. California, certiorari granted September 28, 1993, ___ U.S. ___ (62 U.S.L. Week 3241, Dock. No. 92-9049).

In every such case, this court shall be deemed to have rejected appellant's challenge to CALJIC No. 2.90 on the ground that, pursuant to Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455, the court is bound by the California Supreme Court's resolution of the issue. (People v. Sims (1993) 5 Cal.4th 405, 457; People v. Sandoval (1992) 4 Cal.4th 155, 186; People v. Noguera (1992) 4 Cal.4th 599, 633-634; People v. Johnson (1992) 3 Cal.4th 1183, 1234; People v. Jennings (1991) 53 Cal.3d 334, pp. 385-386.)

The purpose of this order is to ensure that this issue will be preserved for review after rendition of the decision in Sandoval v. California, supra, without the need for appellants in pending appeals to raise the issue in opening, reply or supplemental briefs or in petitions for rehearing on an individual basis.

Dated: November 9, 1993.

/s/
LILLIE, A.P.J.

COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

MISC. ORDER 93-1

THE COURT:

IT IS HEREBY ORDERED that in every criminal appeal from a judgment after jury verdict pending before this court and not yet final, appellant shall be deemed to have challenged the constitutionality of CALJIC No. 2.90 (4th ed. 1979) based on *Sandoval* v. *California*, certiorari granted September 28, 1993, ___ U.S. ___ (62 U.S.L. Week 3241, 3259, Dock. No. 92-9049); and the Attorney General shall be deemed to have argued that this court must reject appellant's challenge to CALJIC No. 2.90 for the following reasons: (1) the decisions in *People* v. *Jennings* (1991) 53 Cal. 3d 334 and *Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450; (2) the critical difference in wording between CALJIC No. 2.90 and the Louisiana instruction implicated in *Cage* v. *Louisiana* (1990) 498 U.S. 39; and (3) the absence of any reasonable likelihood that a jury would apply the CALJIC No. 2.90 instruction in a way that would violate the federal Constitution (*Boyde* v. *California* (1990) 494 U.S. 370); and this court shall be deemed to have rejected the challenge on the ground that it is bound by the California Supreme Court's resolution of the issue (*Auto Equity Sales, Inc.* v. *Superior Court*, *supra*, 57 Cal.2d at p. 455; *People* v. *Sims* (1993)

5 Cal.4th 405, 457; *People* v. *Noguera* (1992) 4 Cal.4th 599, 633-634; *People* v. *Sandoval* (1992) 4 Cal.4th 155, 186; *People* v. *Johnson* (1992) 3 Cal.4th 1183, 1234; *People* v. *Jennings*, *supra*, 53 Cal.3d at 385-386).

The purpose of this order is to ensure that this issue will be preserved for review after rendition of the decision in *Sandoval* v. *California* without the need for appellants in pending appeals to raise the issue in opening, reply or supplemental briefs or in petitions for rehearing on an individual basis.

Dated: 11/5/93

/s/ Puglia
Presiding Justice

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

MISC. ORDER 11-04-93

THE COURT:

IT IS HEREBY ORDERED that in every criminal appeal pending before this court from a judgment following a jury verdict and not yet final as to this court and in which appellant's opening brief is on file on the date of this order, appellant shall be deemed to have challenged the constitutionality of CALJIC No. 2.90 (4th ed. 1979) as in Sandoval v. California, certiorari granted September 28, 1993, ___ U.S. ___ (62 U.S.L. Week 3241, Dock. No. 92-9049). Unless the opinion deals expressly with the issue, this court's opinion in any such case shall be deemed to reject that challenge on the ground that, pursuant to Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455, the court is bound by the California Supreme Court's resolution of the issue. (People v. Sims (1993) 5 Cal.4th 405, 456-457; People v. Sandoval (1992) 4 Cal.4th 155, 185-186; People v. Noguera (1992) 4 Cal.4th 599, 633-634; People v. Johnson (1992) 3 Cal.4th 1183, 1234-1235; People v. Jennings (1991) 53 Cal.3d 334, 385-386.)

The purpose of this order is to ensure that this issue will be preserved for review in the cases described after rendition of the decision in Sandoval v. California without the need for appellants in those cases to raise the issue in supplemental pleadings or petitions on an individual basis. The order is without prejudice to any appellant's arguing the court is not bound by Auto Equity Sales, Inc. v. Superior Court, supra, 57 Cal.2d 450.

/s/
KREMER, P.J.

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FOURTH APPELLATE DISTRICT, DIVISION TWO
MISCELLANEOUS ORDER 93-1

THE COURT:

IT IS HEREBY ORDERED that in criminal cases not yet final wherein the defendant has been found guilty by a trier of fact, this Court deems that all appealing defendants have raised the argument that the definition of reasonable doubt, as set forth in CALJIC No. 2.90, is unconstitutional. This Court further deems that the Attorney General has opposed this argument on the ground that the Court is bound to follow prior state Supreme Court decisions upholding the constitutional validity of the instruction under principles of stare decisis.

In those criminal proceedings wherein the defendant has been found guilty by a trier of fact, this Court will incorporate, in all opinions and orders denying a petition for rehearing issued after the date of this order, reference to this argument having been deemed raised and opposed in addition to its determination that it is bound, under Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455, to follow prior state Supreme Court decisions upholding the constitutional validity of the definition of reasonable doubt as set forth in CALJIC No. 2.90.

Based upon the above, until further notice or order of this Court, parties are not required to raise this issue in opening, reply, or supplemental briefs or petitions for rehearing in order to preserve it on the merits.

Prior to the filing of this order, this Court has denied appellants' requests in a number of appeals for permission to serve and file supplemental briefs raising this argument in cases where no opinion has been filed. This miscellaneous order also applies to all of those cases, and, therefore, all of those requests are DEEMED to have been reconsidered, and all orders denying those requests are hereby VACATED. Pursuant to this order, this Court will incorporate the above-described reference in the opinion in each of these cases. The clerk of this court is DIRECTED to place a copy of this miscellaneous order in the miscellaneous documents file of each of these appeals and mail copies to counsel of record.

The purpose of this order is to ensure that this issue will be preserved for review in the cases described after rendition of the decision in People v. Sandoval (1992) 4 Cal.4th 155, certiorari granted September 28, 1993, without the need for appellants in those cases to raise the issue on an individual basis. The order is without prejudice to any appellant's arguing the Court is not bound by Auto Equity Sales, Inc. v. Superior Court, supra.

/s/ Ramirez
P. J.

COURT OF APPEAL ---- STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA, Respondent	G013849
vs.	Orange County No. C-94705
Appellant	

Defendant's request to file a supplemental brief challenging the constitutionality of CALJIC No. 2.90 is granted. The proposed supplemental brief is deemed filed this date. The Attorney General may file a response if he wishes within 15 days of the filing of this order, but is not required to do so. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455; see People v. Jennings (1991) 53 Cal.3d 334, 385; People v. Smith (1992) 9 Cal.App.4th 196, 202.)

Presiding Justice

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIFTH APPELLATE DISTRICT

MISCELLANEOUS ORDER NO. 93-01

THE COURT:

IT IS HEREBY ORDERED that in every criminal appeal pending before this court from a judgment following a jury verdict where the disposition is not yet final, appellant shall be deemed to have challenged the constitutionality of CALJIC No. 2.90 based on Sandoval v. California, certiorari granted September 28, 1993, ___ U.S. ___ (Dock. No. 92-9049).

It shall also be deemed in every such case that the Attorney General argues that this court must reject the appellant's challenge to CALJIC No. 2.90 because of: (1) the decisions in People v. Jennings (1991) 53 Cal. 3d 334 and Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450; (2) the critical difference in wording between CALJIC No. 2.90 and the Louisiana instruction implicated in Cage v. Louisiana (1990) 498 U.S. 39; and (3) the absence of any reasonable likelihood that a jury would apply the CALJIC No. 2.90 instruction in a way that would violate the federal constitution. (Boyle *[sic]* v. California (1990) 494 U.S. 370.)

In every such case, this court shall be deemed to have rejected appellant's challenge to CALJIC No. 2.90 on the ground that, pursuant to Auto Equity Sales, Inc. v. Superior Court, supra, 57 Cal.2d 450, 455, the court is bound by the California Supreme Court's resolution of the issue. (People v. Sims (1993) 5 Cal.4th 405, 457; People v. Sandoval (1992) 4 Cal.4th 155, 186; People v. Noguera (1992) 4 Cal.4th 599, 633-634; People v. Johnson (1992) 3 Cal.4th 1183, 1234; People v. Jennings, supra, 53 Cal.3d at pp. 334, 385-386.)

The purpose of this order is to ensure that this issue will be preserved for review after rendition of the decision in Sandoval v. California, supra, without the need for appellants in pending appeals to raise the issue in opening, reply or supplemental briefs or in petitions for rehearing on an individual basis.

Dated: November 4, 1993.

/s/_____

BEST, P.J.

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MISC. ORDER 93-1

BY THE COURT

IT IS HEREBY ORDERED that in every criminal appeal pending before this court and not yet final from a judgment following a jury verdict, appellant shall be deemed to have challenged the constitutionality of CALJIC No. 2.90 based on Sandoval v. California, certiorari granted September 28, 1993, ___ U.S. ___ (Dock. No. 92-9049), and this court shall be deemed on the date of the filing of the opinion to have rejected that challenge on the ground that, pursuant to Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455, the court is bound by the California Supreme Court's resolution of the issue. (People v. Sims (1993) 5 Cal.4th 405, 457; People v. Sandoval (1992) 4 Cal.4th 155, 186; People v. Noguera (1992) 4 Cal.4th 599, 633-634; People v. Johnson (1992) 3 Cal.4th 1183, 1234; People v. Jennings (1991) 53 Cal.3d 334, 385-386.)

The purpose of this order is to ensure that this issue will be preserved for review after rendition of the decision in Sandoval v. California without the need for appellants in pending appeals to raise the issue in opening, reply or supplemental briefs or in petitions for rehearing on an individual basis.

Any prior orders of this court to the contrary in individual cases are vacated and superseded by this order.

Dated: NOV. 5, 1993

_____P.J.

Supreme Court, U.S.
FILED
DEC 21 1993
OFFICE OF THE CLERK

No. 92-9049

In The

Supreme Court of the United States

October Term, 1993

ALFRED ARTHUR SANDOVAL,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of California

PETITIONER'S REPLY BRIEF

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TOPICAL INDEX

Page

I. SUMMARY AND OVERVIEW 1

II. FLAWS AND FALLACIES IN RESPONDENT'S ARGUMENTS 2

A. Respondent's Failure to Address the Array of Dictionaries and Other Objective Reference Materials Cited by Petitioner 2

1. The particular value of empirical reference materials in determining how jurors would likely understand this instruction 3

2. This Court's longstanding reliance on dictionaries and similar sources to elucidate the common meanings of statutes, regulations, and other provisions 5

3. Respondent's failure to offer any alternative reference point regarding the meaning of "moral certainty" 7

B. Respondent's Refusal to Acknowledge That the Instruction in This Case Lacks Any of the Constitutionally Correct Components Found in *Cage*, *Webster*, and Other Reasonable Doubt Instructions 8

C. Respondent's Untenable Insistence That the "To a Moral Certainty" Language Does Not Reduce the Constitutionally Required Level of Certainty 10

1. The meaning of "moral certainty" 10

2. The "abiding conviction" washout 10

TOPICAL INDEX – Continued

Page

D. Respondent's Refusal to Recognize the Instruction's Interjection of Moral Considerations Into Jury Deliberations 11

E. Respondent's Misplaced Reliance on Other Instructions, Arguments of Counsel, and Miscellaneous Matters to Mitigate the Damage 13

1. Other instructions 13

2. Arguments of trial counsel 13

3. Miscellaneous matters 15

F. Respondent's Failure to Address the Record as a Whole as Required by *Boyde* and *Estelle* 17

III. RESPONDENT'S PROPHECY OF CRIMINAL JUSTICE CHAOS 19

IV. CONCLUSION 20

TABLE OF AUTHORITIES CITED

Page

CASES – FEDERAL

Boyde v. California, 494 U.S. 370 (1990) 4, 17, 19

Brewer v. Williams, 430 U.S. 387 (1977) 6

Cage v. Louisiana, 498 U.S. 39 (1990) 8, 9, 17

California v. Hodari D., 499 U.S. 621, 113 L.Ed. 690 (1991) 5

California v. Minjares, 443 U.S. 916 (1979) 7

Church of the Lukumi Babalu Aye v. City of Hialeah, ___ U.S. ___, 113 S.Ct. 2217 (1993) 5

City of Canton v. Harris, 489 U.S. 378 (1989) 6

Estelle v. McGuire, 502 U.S. ___, 116 L.Ed. 2d 385 (1991) 17, 19

Evitts v. Lucey, 469 U.S. 387 (1985) 16

Griffith v. Kentucky, 479 U.S. 314 (1987) 19, 20

Hartford Fire Co. v. California, ___ U.S. ___, 113 S.Ct. 2891 (1993) 8

In re Winship, 397 U.S. 358 (1970) 9

Lanigan v. Maloney, 853 F.2d 40 (1st Cir. 1988) 9

Lego v. Twomey, 404 U.S. 477 (1971) 6

McClesky v. Kemp, 481 U.S. 279 (1987) 6

McCoy v. Court of Appeal, 486 U.S. 429, 100 L.Ed.2d 440 (1988) 16

Miles v. United States, 103 U.S. 304 (1881) 11

Schneble v. Florida, 405 U.S. 427 (1972) 6

TABLE OF AUTHORITIES CITED – Continued

Page

Sullivan v. Louisiana, ___ U.S. ___, 113 S.Ct. 2078 (1993) 19

United States v. Holland, 348 U.S. 121 (1954) 9

CASES – STATE

Commonwealth v. Webster, 59 Mass. (5 Cush.) 295 (1850) 9

State v. Bryant, 432 S.E.2d 291 (N.C. 1993) 11

OTHER

American Heritage College Dictionary (3d ed. 1993) 7

American Heritage Dictionary of the English Language (3d ed. 1993) 1, 3

Baade, "Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch," 51 Texas L. Rev. 1325 (1973) 7

CALJIC 1.00 13

Collins' English Dictionary (3d ed.) 10, 12

Landau, *Dictionaries: The Art and Craft of Lexicography* (1984) 8

Mass. Model Jury Instructions 2.05 9

Merriam-Webster's Collegiate Dictionary (10th ed. 1993) 1, 7

New Shorter Oxford English Dictionary, The (Oxford, 1993) 7

Oxford English Dictionary 2, 7, 8

TABLE OF AUTHORITIES CITED – Continued

Page

Random House College Dictionary (1980) 3

Schlesinger, Baade, et al., *Comparative Law* (1988) 7

Shapiro, "To a Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850, 38 Hastings L.J. 153 (1986) 15

Webster's II New Riverside Dictionary (1988) 1, 12

Webster's International Dictionary of the English Language (G. and C. Merriam Co., 1906) 20

Webster's New World Dictionary of American English (3rd College ed. 1991) 1

Webster's Ninth Collegiate Dictionary (9th ed. 1991) 10

Webster's Third New International Dictionary (1986) 5, 8

I. SUMMARY AND OVERVIEW

Conspicuously absent from the bevy of briefs filed by respondent and various amici curiae is a direct response to petitioner's extensive survey of objective source materials – dictionaries and newspapers – in which the phrase "moral certainty" is defined or used in a manner *in*consistent with the constitutional standard of proof beyond a reasonable doubt. The purpose of the survey was to provide a basic reference point for determining how reasonable jurors would understand "moral certainty" as the linchpin of the reasonable doubt instruction in this case, and it revealed a striking incompatibility between the current usage of the phrase "moral certainty" and the core concept of proof beyond a reasonable doubt. To illustrate, petitioner has inserted dictionary synonyms of "moral certainty" into hypothetical reasonable doubt jury instructions, yielding patently unconstitutional results:

> – You may convict if you find that the defendant's guilt is "probable though not proved," *Merriam-Webster's Collegiate Dictionary* (10th ed. 1993).
>
> * * *
>
> – You may convict if you find the defendant's guilt is "[b]ased on strong probability," *Webster's New World Dictionary of American English* (3rd College ed. 1991).
>
> * * *
>
> – You may convict if you find the defendant guilty "[b]ased on a firm conviction rather than on the actual evidence," *American Heritage Dictionary of the English Language* (3d ed. 1993).
>
> * * *
>
> – You may find defendant guilty "[b]ased on strong likelihood of conviction rather than on solid evidence," *Webster's II New Riverside Dictionary* (1988).

All but one of the other dictionaries surveyed by petitioner contain meanings similarly inconsistent with proof

beyond a reasonable doubt.[1] Respondent and amici curiae have chosen to ignore this extensive survey of objective reference materials – "One cannot rely purely on dictionaries, of course, to provide definitive statements of the meanings jurors ascribe to words and phrases employed in jury instructions," Respondent's Brief, p. 20; hereinafter "RB." Instead, they argue that jurors would likely ascribe to the phrases a meaning *different* from that extant in the world at large when hearing the key phrases in the context of a courtroom – "In the actual instruction these phrases operate to convey ideas quite different from those petitioner ascribes to them in abstract isolation." RB 8. While respondent pejoratively characterizes the meanings petitioner ascribes to "moral certainty" as occurring in "abstract isolation," they are in fact the meanings found in ordinary usage.

An analysis of the instruction in this case – both the component phrases and the sum of the parts – in the context of the record as a whole demonstrate more than a reasonable likelihood that the jury convicted petitioner upon a standard of proof less than the constitutional requirement of proof beyond a reasonable doubt.

II. FLAWS AND FALLACIES IN RESPONDENT'S ARGUMENTS

A. Respondent's Failure to Address the Array of Dictionaries and Other Objective Reference Materials Cited by Petitioner

Respondent and amici curiae disregard both common sense and case law in dismissing every reliable indicator of contemporary language usage as mere "dictionary definitions" (RB 20) that "do not materially aid" the inquiry (RB 16) how petitioner's jury likely understood its instructions.

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[1] Regarding the Oxford English Dictionary (hereinafter "OED"), see pages 7-8, *infra*.

1. The particular value of empirical reference materials in determining how jurors would likely understand this instruction

Reference to dictionaries, newspapers, and other empirical reference materials is particularly relevant to this Court's task of determining the likelihood that jurors in this case applied the reasonable doubt instruction in a manner inconsistent with the Constitution. Dictionaries *reflect* common meanings of words and phrases as they occur and evolve in real world usage. They do *not* promulgate prescriptive meanings which might or might not filter down to the lay populace from which jurors are drawn. American dictionaries particularly emphasize their *descriptive* function, as their prefaces make clear. For example, an introductory chapter to the *American Heritage Dictionary of the English Language* (3d ed. 1993) recounts Thomas Jefferson's refusal to preside over an American Academy "for refining, correcting, improving, and ascertaining the English Language." Jefferson asserted that the European model of a centralized linguistic arbiter was ill-suited to the certainty of linguistic change accompanying the social, economic, and political development of America, a premise adopted by American lexicographers.[2] See also the preface to the *Random House College Dictionary* (1980), describing the editor's efforts to ensure that "[m]any recent

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[2] The preface, entitled "A Natural History of English: Language, Culture and the American Heritage," concludes:

> Instead of rules from a National Academy of English, Americans accepted the common-law customs of intelligent conversation *with all its modifications through time and circumstance*. . . . [H]istory shows the correctness of Jefferson's message. *He recognized the certainty of change*, the function of language as a cultural tool, and the importance of thoughtful selection of vocabulary. Through common-law customs of speech and writing the national language develops words and documents social facts. This Dictionary orders those materials of discourse, records the natural history of a people, and transmits the substance of the American heritage. *Id.* at xxiii; emphasis supplied.

words have been included, as have new meanings of old words," and that "definitions have often been modernized or improved." *Id.* at v. Thus, American dictionaries endeavor to describe actual contemporary usage, rather than to ordain some particular usage as correct or desirable independent of its actual usage. Respondent's refusal to acknowledge the overwhelming weight of dictionary and newspaper sources is highly suspect. When, as here, a constitutional question turns on how lay jurors likely understood a particular instruction, common sense suggests that dictionaries and similar sources should be a primary reference point for this Court, not preemptively consigned to insignificance as respondent urges.

Reliance on extrinsic reference points is particularly appropriate in this case where the crucial phrases, "reasonable doubt" and "moral certainty," have been incorporated into the lexicon of law-trained people in a very different manner than they are used by the public at large, a point ably made by the Attorney General of Nebraska[3]. "Moral certainty" was adopted as a legal term of art 150 years ago, and judges and lawyers have been repeating it to each other in a mutually reinforcing manner ever since. During the same period, the meaning of the phrase changed significantly in common parlance *outside* the legal profession. Thus, there is a strong probability that lawyers and judges as law-trained personnel hear these phrases as reaffirming an exacting burden of proof while lay jurors understand the phrases as articulating a lesser burden.

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[3] "As jurists and lawyers we may think we understand that phrase (after years of study and consideration), but under *Boyde* that is *not* the test. The test is the commonsense understanding of those words by a lay jury." Brief of Nebraska, p. 24; emphasis in original.

2. This Court's longstanding reliance on dictionaries and similar sources to elucidate the common meanings of statutes, regulations, and other provisions

Respondent and amici curiae appear to be unaware of a settled feature of this Court's jurisprudence in which reference is routinely made to dictionaries to elucidate the meaning of words and phrases contained in disputed statutes or other writings. This Court regularly relies on dictionaries for both current and historical meanings. See, e.g., *California v. Hodari D.*, 499 U.S. 621, 113 L.Ed. 690, 695 (1991) ("From the time of the founding to the present, the word 'seizure' has meant 'a taking possession,' " citing Webster's 1828 edition and *Webster's Third New International Dictionary* (1986)). Moreover, this Court looks to dictionaries to determine whether a word has developed current usages different from its original meaning. See, e.g., *Church of the Lukumi Babalu Aye v. City of Hialeah*, ___ U.S. ___, 113 S.Ct. 2217, 2227 (1993) ("the words 'sacrifice' and 'ritual' have a religious origin, but current use admits also of secular meanings," citing *Webster's Third New International Dictionary*). Indeed, in the past 15 years alone, this Court has referred to dictionaries in more than 200 cases to understand or interpret a particular word or phrase.

Given this Court's substantial reliance on dictionary references as a basic source of information, the refusal of respondent and amici curiae (particularly the Solicitor General) to respond to petitioner's source materials must be viewed as a virtual concession by silence.[4] The Solicitor General argues that the *nineteenth century* case law accords synonymity to the phrases "proof beyond a reasonable doubt" and "moral certainty." S.G. Brief, p. 19. This point is accurate

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[4] In contrast, petitioner is not imputing any talismanic effect to dictionary definitions; he simply urges this Court to give them the consideration generally accorded in this Court's jurisprudence.

although irrelevant to the meaning that a late *twentieth century* jury would give to the latter phrase. The Solicitor General's attempt to bridge the gap – "[n]or has the term lost its meaning in modern usage" – cites *not* contemporary lexicographical sources but four decisions of this Court in which the phrase "moral certainty" was used in passing, an inherently tangential response given that the constitutional focus is on the likely understanding of *jurors*, not jurists.[5]

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[5] The cited cases fail to support the Solicitor General's implicit premise that "moral certainty" is currently viewed as synonymous with "utmost certainty" by this Court. *Schneble v. Florida*, 405 U.S. 427, 431 (1972) in no way focused on the meaning of "moral certainty" language. Rather, the Court considered whether a *Bruton* violation was harmless in light of "petitioner's comprehensive confession," and noted that the jury could not have convicted Schneble unless it relied on his confession – "Charged as they were by the judge that they must be 'satisfied beyond a reasonable doubt' and 'to a moral certainty' of Schneble's guilt before they could convict him, the jurors could on no rational hypothesis have found Schneble guilty without reliance on his confession." *Id.* The excerpted quotation from the Florida jury instruction is so tangential to the determination of the case that it can hardly be impressed into service as a substantial lexicographical pronouncement by this Court. Next, this Court did not itself even use the phrase "moral certainty" in *McClesky v. Kemp*, 481 U.S. 279, 308, n. 29 (1987), but rather quoted a witness who happened to use the phrase in the course of testimony. *City of Canton v. Harris*, 489 U.S. 378, 390, n. 10 (1989), observed that "[c]ity policy makers know to a moral certainty that their police officers will be required to arrest fleeing felons," a use of the phrase consistent with a *range* of degrees of certainty, including probability. Moreover, the Court used that phrase in a distinct sense of predicting a *future* event, not determining the existence of a prior event. In the Solicitor General's fourth citation, Justice White used the phrase "moral certainty" in his dissent in *Brewer v. Williams*, 430 U.S. 387, 434 (1977), stating that the defendant's knowledge of his right to counsel "is established on this record to a moral certainty," and urging that an intentional waiver was similarly shown. Given that the legal standard for proving a knowing waiver of the right to counsel is the *preponderance of the evidence*, *Lego v. Twomey*, 404 U.S. 477, 488 (1971), Justice White's use of the phrase adds no support to the Solicitor General's implicit assertion that this court understands the phrase "moral certainty" to be currently synonymous with "proof beyond a reasonable doubt."

The Solicitor General declined to cite the fifth instance in which the phrase "moral certainty" occurs in this Court's jurisprudence since 1950. In *California v. Minjares*, 443 U.S. 916 (1979), then-Justice Rehnquist, dissenting from a denial of a stay request, expressed a judiciously qualified belief that the exclusionary rule at issue in the case was an anomaly from an international law perspective – "I do not claim to be an expert in comparative law, but I feel morally certain that the United States is the only nation in the world in which the most relevant, most competent evidence as to the guilt or innocence of the accused is mechanically excluded because of the manner in which it may have been obtained." *Id.* at 919.

That usage is entirely consistent with definitions such as "probable though not proved," *Merriam-Webster's Collegiate Dictionary* (10th ed. 1993) and "[b]ased on a strong likelihood or firm conviction, rather than on actual evidence," *American Heritage College Dictionary* (3d ed. 1993). Indeed, while Chief Justice Rehnquist was generally correct in his observation, his judicious selection of the qualifying phrase "moral certainty" left room for reasonable disagreement, see, e.g., Schlesinger, Baade, et al., *Comparative Law* (1988), p. 425, fn. 25a ("Although modern civil law systems generally reject exclusionary rules of evidence, there are some recent German cases excluding evidence obtained in violation of a constitutionally protected right of privacy," referring to cases cited in Baade, "Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch," 51 Texas L. Rev. 1325 (1973).

3. Respondent's failure to offer any alternative reference point regarding the meaning of "moral certainty"

Respondent has presented nothing at all to controvert petitioner's demonstration of the meanings that "moral certainty" has evolved in twentieth century American usage. The only objective reference by respondent or amici is to the definition of moral certainty in the *Oxford English Dictionary*, which the District Attorney's Association triumphantly proclaims as "[t]he most recent, authoritative reference dictionary of the English language," citing to *The New Shorter Oxford English Dictionary* (Oxford, 1993). Petitioner readily acknowledges, as do lexicographers generally, that the Oxford dictionaries are authoritative sources as to what words *used* to

mean in their Anglo-Saxon origins, but not necessarily as to their *current* meaning. It is telling that the *only* dictionary cited by respondents and their amici is the dictionary singled out for its role in "provid[ing] a historical record of the development and meaning of each word," Landau, *Dictionaries: The Art and Craft of Lexicography*, p. 71 (1984).[6] Nor has respondent attempted to controvert petitioner by citing instances in the print or other media where the phrase "moral certainty" was used in a manner consistent with the concept of proof beyond a reasonable doubt.

B. Respondent's Refusal to Acknowledge That the Instruction in This Case Lacks Any of the Constitutionally Correct Components Found in Cage, Webster, and Other Reasonable Doubt Instructions

The primary thrusts of Respondent's Brief are that the putative defects in the instruction are neither coextensive with the *Cage* defects[7] nor as debilitating as petitioner asserts. Respondent ignores petitioner's complementary argument that the instruction suffers from defects of *omission* in addition to defects of *commission*. The *primary* feature of the instruction

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[6] Moreover, despite the characterization of the District Attorney's Association that the *Oxford English Dictionary* (OED) is the "most . . . authoritative reference dictionary," this Court *seldom* refers to it. During the past 15 years, this Court has in some 200 cases referred to dictionaries, but the *Oxford Dictionary* appears in fewer than ten percent of these cases. Furthermore, this Court has chosen to rely on definitions in American dictionaries when inconsistent with the OED. See, e.g., *Hartford Fire Co. v. California*, ___ U.S. ___, 113 S.Ct. 2891, 2912 (1993) (following *Webster's Third New International Dictionary* rather than the OED). Thus, respondent's reliance on the lone entry in the *Oxford English Dictionary* to support its position is hardly convincing in the face of the uniformly contradictory definitions in American dictionaries.

[7] *Cage v. Louisiana*, 498 U.S. 39 (1990). Petitioner argued that the *Cage* instruction established no monopoly on unconstitutional formulations, and pointed out that the *Cage* instruction had redeeming features absent from this instruction. Petitioner's Brief, pp. 35-36.

in this case, viewed as a *whole*, is that it contains none of the generally accepted and indisputably constitutional language currently in widespread use in explanatory instructions throughout the country; see Petitioner's Brief on the Merits, appendix B. In contrast to other instructions which contain one or more affirmative and constitutionally correct explanations of reasonable doubt, there is nothing clearly constitutional and correct about this instruction, as there was in the *Cage* instruction, or as exists in the larger passage in *Webster* from which the instant instruction was excerpted. The *Cage* instruction specifically informed the jury that "[e]ven where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused," 498 U.S. at 40. Similarly, the original *Webster* discussion of reasonable doubt[8] *and* the modern version of the *Webster* charge currently given in Massachusetts both contain language explicitly informing the jury that the level of certainty must be *greater than* a "strong probability."[9] See petitioner's Brief on the Merits, appendix B-18.

Nor does the instruction in this case contain any clear and accurate phrases such as "utmost certainty," *In re Winship*, 397 U.S. 358, 364 (1970) or a conviction "*approaching* absolute certainty," *Lanigan v. Maloney*, 853 F.2d 40, 47 (1st Cir. 1988) (emphasis in original). Nor does it include any version of the "hesitate to act" language long-since approved by this Court and currently used in a large number of states.[10]

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[8] *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295 (1850).

[9] See Mass. Model Jury Instructions 2.05 – "It is not enough for the Commonwealth to establish a probability, even a strong probability, that the defendant is more likely to be guilty than not guilty. That is not enough."

[10] See *United States v. Holland*, 348 U.S. 121 (1954). Ten states currently employ some permutation of the "hesitate to act" explanation of reasonable doubt. See Petitioner's Brief, appendix B – Arkansas, Colorado, Connecticut, Idaho, Indiana, Iowa, New Mexico, Pennsylvania, South Carolina, and Texas.

An objective overview of the instruction in this case reveals it to be convoluted in structure, consisting of negatives, and lacking any clearly constitutional explanation of proof beyond a reasonable doubt. Respondent's reference to the "organic whole" of the instruction merely reinforces petitioner's assertion that the instruction *lacks* any constitutionally correct anchor. Rather, the instruction is comprised solely of the jurisprudential equivalent of leaks which individually and together dilute the standard of proof beyond a reasonable doubt.

C. Respondent's Untenable Insistence That the "To a Moral Certainty" Language Does Not Reduce the Constitutionally Required Level of Certainty

1. The meaning of "moral certainty"

The heart of respondent's argument on this point, RB 19, is that 1) the word "certainty" by itself "can hardly present an unacceptable likelihood that jurors will not only misunderstand but misunderstand it in a way that reduces the prosecution's burden"; and 2) the modifier "moral" or "morally" "does not operate to minimize any level of certainty," concluding with the *ipse dixit* that "one who is morally certain of the 'truth of the charge' is not *less* certain of it than one who is simply described as certain." To the contrary, modifiers generally alter the meaning of the word modified, and in this case the modifier "moral," in its sense of "probable though not proved," *Webster's Ninth Collegiate Dictionary*, 771 (9th ed. 1991), or "having a strong probability," *Collins' English Dictionary* (3d ed.), conveys a degree of conviction *less* than the utmost certainty required for proof beyond a reasonable doubt. Respondent literally offers nothing to the contrary but the *ipse dixit* "hardly."

2. The "abiding conviction" washout

Next, respondent argues that "[t]he linking of 'abiding conviction' and 'moral certainty' properly emphasizes the

high degree of proof needed to convict." RB 22. This argument simply ignores that in context, the prepositional phrase "to a moral certainty" *qualifies* the "abiding conviction" phrase. The mere fact that the two phrases are linked, without consideration of the grammatical *nature* of the linkage, does not establish that the phrases are equivalences. If, as petitioner has demonstrated, "moral certainty" conveys a lesser degree of certainty than proof beyond a reasonable doubt, the plain English meaning of the sentence instructs the jurors to convict when they feel an abiding conviction, to a lesser degree of certainty than beyond a reasonable doubt, of the truth of the charge.[11]

D. Respondent's Refusal to Recognize the Instruction's Interjection of Moral Considerations Into Jury Deliberations

Respondent misconceives petitioner's argument that the phrases "moral certainty" and "moral evidence" invite the

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[11] Respondent's citation of *Miles v. United States*, 103 U.S. 304 (1881), does not support its odd notion of "linking." Nothing in *Miles* suggests that the Court there viewed the language "abiding conviction in the mind to a moral certainty" as conveying either an equivalency or an independence of "abiding conviction" and "moral certainty" in defiance of explicit sentence structure. What *Miles* did do, of course, was to hold that 112 years ago there was no inconsistency between the constitutional standard of proof beyond a reasonable doubt and the then-current meaning of an "abiding conviction in the mind to a moral certainty." This is the *starting point* of petitioner's argument, which is based precisely on the fact that the phrase "moral certainty" has seen such a change in common usage during the past century that jurors can no longer reasonably be expected to take it as having its 1881 meaning. As soon as any twentieth-century reference materials are consulted – as they were in *State v. Bryant*, 432 S.E.2d 291 (N.C. 1993) – this change and the consequent undermining of the conventional premise of *Miles* becomes immediately apparent. *Bryant*, scrupulously ignored by respondent, also belies respondent's assertion that "[a]mong the cases petitioner cites in his brief on the 'moral certainty' question, none invalidates a reasonable doubt instruction on constitutional grounds." RB 25.

jurors to interject their moral and emotional responses to the evidence in determining guilt. Respondent asserts that "petitioner's dictionary and usage examples . . . in no way suggest that the phrase 'moral certainty' becomes *incomprehensible* when explicitly premised upon a foundation of objective evidence." RB 16; emphasis supplied. Petitioner has never argued that the phrase "moral certainty" is *incomprehensible* to jurors; to the contrary, petitioner argues that there is a reasonable likelihood that jurors understand it in accordance with its current meaning of "based on a strong likelihood of conviction rather than on solid evidence," *Webster's II New Riverside Dictionary; Webster's Third New International Dictionary* (1986). That definition comports with the way people make decisions in their personal and business affairs based on their moral certainty of a fact somewhat supported but not compelled by concrete evidence. As a matter of common sense and common parlance, there are innumerable instances where, for example, a fair-minded employer fires an employee for stealing, based on the employer's moral certainty of pilfering, even though the employer does not necessarily believe that theft can be proved beyond a reasonable doubt in the legal sense.

Regarding "moral evidence," respondent again mischaracterizes petitioner's argument in asserting that "[p]etitioner nevertheless suggests that phrases like 'moral evidence' are anachronisms *without meaning to a modern jury*." RB 32 (emphasis supplied). Petitioner has consistently argued that "moral evidence" *has* a modern meaning: one which is both different from its eighteenth and nineteenth century meaning and inconsistent with the constitutional standard of proof beyond a reasonable doubt. When the "moral evidence" phrase was used in jury instructions a century or more ago, it was a synonym for empirical evidence, i.e., everything that the jury would hear in the courtroom. That eighteenth-century Lockean meaning has been lost over time, and the phrase is now more likely to be understood as the equivalent of character evidence – "based on knowledge of the tendencies of human nature," *Collins English Dictionary*

(3d ed.), i.e., referring to the moral aspects of a defendant's conduct.

Finally, respondent refuses to acknowledge the deleterious effect of linking "moral evidence" and "moral certainty" in a reasonable doubt instruction. The instruction places an unconstitutional imprimatur on the jury's use of moral evidence, i.e., evidence of petitioner's "nature" as gang-oriented and violence-prone, to supplement the prosecutor's objective (but singularly unprepossessing) evidence of guilt. It thus legitimates a guilty verdict based in some part on the jury's assessment of petitioner's moral character as well as on the prosecutor's objective evidence. These phrases are not anachronistically innocuous; they are affirmatively misleading.

E. Respondent's Misplaced Reliance on Other Instructions, Arguments of Counsel, and Miscellaneous Matters to Mitigate the Damage

1. Other instructions

Respondent relies on the boilerplate introductory jury instruction as exerting a mitigating influence on the jurors' understanding of the reasonable doubt instruction, i.e., that they were directed "to determine the facts of the case from the evidence received in the trial and not from any other source," and to resist being influenced by "sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling." CALJIC 1.00. The first part of the instruction simply tells the jurors not to rely on extrajudicial matters such as media publications, local gossip, or unauthorized experiments or inquiries. It does nothing to set the standard of proof or to deter jurors from including the moral aspects and impact of the courtroom evidence in their deliberations. The second part of the instruction lists inappropriate influences; conspicuously absent from the list are moral considerations. The public generally views moral values and considerations as highly *positive* influences, and jurors would likely bridle under a suggestion that their moral responses fell with the prohibited areas of "passion," "prejudice," or other undesirable influence.

Similarly, the fact that the phrase "beyond a reasonable doubt" was reiterated during the course of other jury instructions, albeit never explained, does not cure the constitutional error arising from the single defective *definition* of reasonable doubt given to the jury. While amicus District Attorney's Association notes that the instruction defining each offense charged against petitioner began with a phrase that "the burden is on the People to prove beyond a reasonable doubt each of the elements . . . ," Amicus Brief, p. 15, neither respondents nor amici suggests any logical mechanism by which the mere repetition of the phrase "beyond a reasonable doubt" cures the defects in the *definition* of this standard of proof as given to the jury. To the extent that the Attorney General of Nebraska is correct that "the concept of reasonable doubt, standing alone, has little meaning to most people" (Brief of Nebraska, p. 24), its repetition as a talismanic mantra can hardly ensure the jury's enlightenment as to the underlying concept.

2. Arguments of trial counsel

Next, respondent argues that "petitioner's trial counsel repeatedly made beneficial use of the very instructions petitioner now challenges in this appeal" (RB 28), and cites a number of instances in jury voir dire where the attorney merely parroted the phrase "beyond a reasonable doubt" and "to a moral certainty" in describing the prosecution's burden of proof. RB 28-29. However, as noted above, the mere reiteration of the phrase, whether or not it constitutes "beneficial use" of the instruction, hardly clarifies for the jury the level of certainty they need to convict.

Moreover, defense counsel confessed *confusion* about what the instruction meant:

> What we're talking about is an abiding conviction to a moral certainty of the truth of the charge. I'm not sure what that means exactly. I guess that you kind of know it when you see it. Do I have a doubt? Is that doubt reasonable? That is the question you have to ask. JA 79.

A fair reading of respondent's transcript citations negates any inference that counsel's voir dire or argument had *any* ameliorative effect in conveying to the jury a proper understanding of proof beyond a reasonable doubt. In one part of voir dire, cited by respondent (RB 28, n. 9), counsel asked whether a juror would defer to a "gut feeling" that "maybe he [petitioner] is involved" as sufficient to convict, or would abide by the court's instructions. JA 29-30. It is hardly a ringing endorsement of the proof beyond a reasonable doubt standard to extract a concession from a juror to forego reliance on gut feelings in favor of the court's instructions. This is apparently the *most* that respondent can muster from the record, and it is manifestly weak.[12]

3. Miscellaneous matters

Respondent also attempts to support the constitutionality of the instruction by referring to such extremely remote factors as 1) criminal defense manuals which contain suggested closing arguments employing the phrase "moral certainty" (RB 27-28); and 2) scattered appellate decisions from various jurisdictions in which defendants had complained of the omission of moral certainty language from their jury instructions (RB 26-27). The substantive import of these references is virtually nil, and it is telling that respondent relies on these

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[12] This would be a different record if defense counsel argued to the jury either in voir dire or in closing argument to the effect that "we all know that moral certainty in its common usage means a mere probability, or a belief based on something other than objective facts, but when used in court it has a different and specialized meaning of utmost certainty based solely on the objective evidence before you." If, for example, defense counsel had quoted and argued to the jury the article by Shapiro, *"To a Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850,* 38 Hastings L.J. 153 (1986), and argued that this jury must view the phrase "moral certainty" in the same manner as it was originally intended hundreds of years earlier, then respondent would have a legitimate point that defense counsel used it to petitioner's benefit. Of course, no explanatory gloss remotely like that was proffered by either the prosecutor or defense counsel during the course of the case.

tangential and remote factors to support his position, rather than on directly relevant lexicographical sources.

Respondent's argument fails for many reasons, one of which is that it is part of a defense attorney's trade to try to make lemonade out of legal and factual lemons arising in a particular case. One can only expect practical treatises, such as those cited by respondent, to suggest a positive spin to put on instructional language, but that hardly constitutes an affirmative endorsement of it. Moreover, the excerpted arguments cited by respondent (RB 27-28) in no way suggest that there exists a common understanding of "moral certainty" as synonymous with "utmost certainty." The only substantive point made in either argument is that proof beyond a reasonable doubt is greater than a probability, a point lacking in the instruction in this case.

Next, respondent and amicus curiae District Attorney's Association cite a smattering of cases from various jurisdictions which reject claims of error that "moral certainty" was not included in the reasonable doubt jury instruction. These cases obviously support *petitioner's* position. *All* of the cited cases reject the argument that "moral certainty" is a necessary component of a reasonable doubt instruction; *none* of the cases provide even dicta to the effect that "moral certainty" is widely recognized as conveying the quintessence, or even a functional facsimile of, proof beyond a reasonable doubt. Rather, the cases reflect widely isolated instances of defense attorneys asserting marginal claims of error against daunting odds, albeit in accordance with counsels' duty of vigorous representation. *Evitts v. Lucey*, 469 U.S. 387, 394 (1985) (the Constitution requires that an indigent criminal appellant have "an active advocate, rather than a mere friend of the court assisting in the detached evaluation of the appellant's claims"); *McCoy v. Court of Appeal*, 486 U.S. 429, 100 L.Ed.2d 440, 457 (1988) ("the [defendant's] attorney must be zealous and must resolve all doubts and ambiguous legal questions in favor of his or her client").

It is unclear what respondent wishes this Court to read into the scattered cases *rejecting* moral certainty as a necessary component of a reasonable doubt instruction. The most that can be extracted is the inference that the minuscule

minority of defense attorneys who have argued that a moral certainty instruction should have been given (out of the hundreds of thousands of criminal adjudications during the past 50 years) would not have done so if they believed it would hurt their clients. However, this inference founders on the facts that 1) defense lawyers suffer from the same professional blinders noted by the Attorney General of Nebraska (Brief of Nebraska, p. 24); and 2) defense lawyers are hardly considered arbiters of constitutional questions. More to the point at issue here is the fact that the "moral certainty" language has been abandoned in droves by states across the country.

In sum, nothing in the conduct of counsel in this case nor in the conduct of trial counsel generally confirms that the jury in this case applied a constitutionally correct understanding of proof beyond a reasonable doubt.

F. Respondent's Failure to Address the Record as a Whole as Required by Boyde and Estelle

Respondent restricts himself to textual analysis in evaluating the reasonable likelihood that the jury was misled by the instruction, supplemented only by brief references to voir dire and argument. Petitioner argues that the textual analysis is an appropriate *starting* point for determining the constitutionality of the instruction, as in *Cage, supra*, but that *Boyde v. California*, 494 U.S. 370 (1990), and *Estelle v. McGuire*, 502 U.S. ___, 116 L.Ed. 2d 385 (1991) require an analysis of the record as a whole if textual analysis does not by itself establish a constitutional violation. Petitioner's Brief, pp. 32-34.

Respondent entirely ignores those aspects of the record specifically recognized by this Court as deserving of consideration in determining whether a jury instruction was unconstitutionally applied, particularly the comparative strength of the parties' evidence and the closeness of jury deliberations. Respondent utterly fails to address either the inherent weakness of the prosecution's case, particularly on the Wells counts, or the unusual difficulty of the jury in reaching a

verdict after some 14 days of deliberations on the Wells counts. Respondent fails to acknowledge that it is precisely where the prosecution's evidence is inherently dubious and where the jury has great difficulty in reaching a verdict that the jury is most likely to whittle down the level of certainty needed for a conviction to its bare minimum consistent with the instructions – in this case "moral certainty" – in order to reach a least common denominator to which all the jurors could subscribe.

In this case, it is highly likely that as the deliberations wore on and on, the jurors found as common ground that it was at least *probable* that petitioner committed the Wells killings – based on the bargained-for, inherently suspect, and substantially impeached testimony of the informer – and then used their adverse moral evaluation of petitioner as a gun-toting, violence-prone gang member to parlay the probability of his guilt (based on the objective evidence) to a moral certainty of his guilt (based on the objective evidence supplemented by the moral or subjective evidence of petitioner's character). It is *un*likely that after 14 days of deliberations the jurors unanimously reached a state of *utmost* certainty about petitioner's guilt; it is far more likely that they eked out a verdict based on a distinctly lesser degree of certainty apparently authorized by the moral certainty instruction.

Moreover, respondent fails to address the actions of the prosecutor in injecting moral and religious overtones into the jury deliberations in this case. Respondent conspicuously ignores petitioner's discussion of how the district attorney branded appellant as a "heathen" in argument, argued that the defense occupied a position of immorality comparable to that of an adulterer, and that the jury should pierce petitioner's courtroom mien and view him as he really was, an Hispanic street thug. See Petitioner's Brief, pp. 37-40. Jurors whose moral response to these themes appeared to be legitimated by the instruction for use in their determination of guilt may well have gone from the moral evidence that petitioner was a dangerous and predatory gang member to the "moral certainty" that he committed the specific offenses charged.

III. RESPONDENT'S PROPHECY OF CRIMINAL JUSTICE CHAOS

Respondent argues, ostensibly in support of a request that a ruling in petitioner's favor be prospective only, that "[a]pplication of *Griffith* and *Sullivan* would overturn every criminal conviction in thousands of non-final cases," resulting in a "catastrophic effect on California's criminal justice system." RB 42. Respondent paints with a brush broader than the case law can support. He is correct that *Griffith v. Kentucky*, 479 U.S. 314 (1987) would require that a ruling in petitioner's favor be applied to all non-final cases pending on appeal. However, if this Court does not find that the instruction is on its face unconstitutional, but rather that there is a reasonable likelihood, based on the record as a whole, that the jury in this case was misled, then the group of non-final appellants would not necessarily be entitled en masse to a reversal of their convictions, but only to the opportunity to make a *Boyde-Estelle* argument that constitutional error occurred under the particular facts of this case. While *Sullivan v. Louisiana*, ___ U.S. ___, 113 S.Ct. 2078 (1993) holds that constitutional error in a reasonable doubt instruction is reversible without recourse to a separate prejudice analysis, *Boyde* and *Estelle* require review of the record as a whole in the determination of whether error occurred, an exercise which largely subsumes prejudice analysis. Petitioner suggests that it is rare that other appellants would be able to demonstrate a similar concatenation of circumstances as occurred in this case (albeit ignored by respondent), militating toward the likelihood of an unconstitutional application of the jury instruction. Thus, respondent's forecasts of catastrophe are greatly exaggerated.

Respondent also argues that prospectivity is appropriate because "it would be impossible to determine exactly when the phrases somehow evolved from accurately describing reasonable doubt into unconstitutionally altering the burden of proof." RB 42. The reference materials cited by petitioner clearly establish that the meaning of the key phrases was incompatible with proof beyond a reasonable doubt at the

time of petitioner's trial, so that he at least is entitled to relief. Moreover, an historical review of American dictionaries reveals that the phrases "moral certainty" and "moral evidence" had acquired their current meanings by the turn of the century, well before any of the jurors sitting on petitioner's case were born.[13] Petitioner's bottom line is that at least he is entitled to relief based on his textual analysis and review of the entire record in this case. Whether this Court wishes to modify the general rule of retroactivity embodied in *Griffith* to meet respondent's concerns about widespread repercussions in the criminal justice system is a policy matter for which petitioner has neither knowledge nor standing. Petitioner's only concern is that respondent and amici are flaunting the spectre of systemic chaos to color this Court's consideration of the merits of this case.

IV. CONCLUSION

Wherefore, for the foregoing reasons, petitioner respectfully requests that this Court reverse the judgment of the Supreme Court of California.

DATED: December 20, 1993

Respectfully submitted,

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[13] For example, the 1906 edition of *Webster's International Dictionary of the English Language* (G. and C. Merriam Co.) (the successor to Noah Webster's original *American Dictionary of the English Language*) deleted the Wilkins quotation characterizing "moral certainty" as "indubitable," and substituted the following definition: "supported by reason or probability; practically sufficient; – opposed to *legal* or *demonstrable*; as *moral* evidence; a *moral* certainty" (emphasis in original).

(9) (8)

Nos. 92-8894 & 92-9049

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OCTOBER TERM, 1993

CLARENCE VICTOR, PETITIONER

v.

STATE OF NEBRASKA

ALFRED ARTHUR SANDOVAL, PETITIONER

v.

STATE OF CALIFORNIA

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA AND THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the jury instructions given in these cases on the meaning of reasonable doubt violated the Due Process Clause.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	4
Argument:	
The jury instructions given in these cases on the meaning of reasonable doubt did not violate the Due Process Clause	5
A. The Due Process Clause does not require a trial court to define for the jury the meaning of "reasonable doubt"	6
B. The Due Process Clause tolerates a range of definitions of "reasonable doubt"	11
C. This Court's decision in *Cage* v. *Louisiana* does not require reversal of the judgments below	16
Conclusion	23
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Agnew v. *United States*, 165 U.S. 36 (1897)	20
Apodaca v. *Oregon*, 406 U.S. 404 (1972)	6
Becker v. *United States*, 5 F.2d 45 (2d Cir. 1924), cert. denied, 267 U.S. 602 (1925)	11-12
Blatt v. *United States*, 60 F.2d 481 (3d Cir. 1932)	7
Boyde v. *California*, 494 U.S. 370 (1990)	22
Brewer v. *Williams*, 430 U.S. 387 (1977)	19
Bumpus v. *Gunter*, 635 F.2d 907 (1st Cir. 1980), cert. denied, 450 U.S. 1003 (1981)	16
Cage v. *Louisiana*:	
498 U.S. 39 (1990)	5, 6, 16, 17, 18, 22
554 So. 2d 39 (1989)	17
City of Canton v. *Harris*, 489 U.S. 378 (1989)	19
Commonwealth v. *Costley*, 118 Mass. 1 (1875)	6

Cases—Continued: Page

Commonwealth v. *Webster*, 59 Mass. (5 Cush.) 295 (1850) 12, 18, 20
Donnelly v. *State*, 26 N.J.L. 601 (1857) 18
Dunbar v. *United States*, 156 U.S. 185 (1895) 7, 13
Estelle v. *McGuire*, 112 S. Ct. 475 (1991) 22
Fidelity Mutual Life Ass'n v. *Mettler*, 185 U.S. 308 (1902) 19
Francis v. *Franklin*, 471 U.S. 307 (1985) 22
Friedman v. *United States*, 381 F.2d 155 (8th Cir. 1967) 7
Gaskins v. *McKellar*, 916 F.2d 941 (4th Cir. 1990), cert. denied, 111 S. Ct. 2277 (1991) 15
Holland v. *United States*, 348 U.S. 121 (1954) 7, 12, 14
Hopt v. *Utah*, 120 U.S. 430 (1887) 7, 13, 19
Jackson v. *Virginia*, 443 U.S. 307 (1979) 5, 12, 21
Johnson v. *Louisiana*, 406 U.S. 356 (1972) 13
Leecan v. *Lopes*, 893 F.2d 1434 (2d Cir.), cert. denied, 496 U.S. 929 (1990) 15
McCleskey v. *Kemp*, 481 U.S. 279 (1987) 19
Medina v. *California*, 112 S. Ct. 2572 (1992) 9
Miles v. *United States*, 103 U.S. 304 (1880) 7, 19
Nanfito v. *United States*, 20 F.2d 376 (8th Cir. 1927) 7
Patterson v. *New York*, 432 U.S. 197 (1977) 9
Perovich v. *United States*, 205 U.S. 86 (1907) 20
Schencks v. *United States*, 2 F.2d 185 (D.C. Cir. 1924) 7
Schneble v. *Florida*, 405 U.S. 427 (1972) 19
Smith v. *Bordenkircher*, 718 F.2d 1273 (4th Cir. 1983), cert. denied, 466 U.S. 976 (1984) 16
State v. *Hammonds*, 85 S.E.2d 133 (N.C. 1954) 18
State v. *Ostrander*, 18 Iowa 435 (1865) 7
State v. *Sauer*, 38 N.W. 355 (Minn. 1888) 6
Taylor v. *Kentucky*, 436 U.S. 478 (1978) 14
Thompson v. *Lynaugh*, 821 F.2d 1054 (5th Cir.), cert. denied, 483 U.S. 1035 (1987) 8
United States v. *Alonzo*, 681 F.2d 997 (5th Cir.), cert. denied, 459 U.S. 1021 (1982) 1a
United States v. *Barrera-Gonzales*, 952 F.2d 1269 (10th Cir. 1992) 15

Cases—Continued: Page

United Staes v. *Blackburn*, 992 F.2d 666 (7th Cir.), cert. denied, 114 S. Ct. 393 (1993) 8
United States v. *Dale*, 991 F.2d 819 (D.C. Cir.), cert. denied, 114 S. Ct. 286 (1993) 15, 3a
United States v. *Daniels*, 986 F.2d 451 (11th Cir. 1993) 15, 2a-3a
United States v. *Edelin*, 996 F.2d 1238 (D.C. Cir. 1993) 15
United States v. *Glass*, 846 F.2d 386 (7th Cir. 1988) 7-8
United States v. *Goodlett*, 3 F.3d 976 (6th Cir. 1993) 1a
United States v. *Hall*, 854 F.2d 1036 (7th Cir. 1988) 9, 16
United States v. *Harris*, 974 F.2d 84 (8th Cir. 1992) 15
United States v. *Ivic*, 700 F.2d 51 (2d Cir. 1983) 8, 10
United States v. *Jorge*, 865 F.2d 6 (1st Cir.), cert. denied, 490 U.S. 1027 (1989) 15-16
United States v. *Moss*, 756 F.2d 329 (4th Cir. 1985) 8
United States v. *Nolasco*, 926 F.2d 869 (9th Cir.), cert. denied, 112 S. Ct. 111 (1991) 8
United States v. *Olmstead*, 832 F.2d 642 (1st Cir. 1987), cert. denied, 486 U.S. 1009 (1988) 8
United States v. *Polan*, 970 F.2d 1280 (3d Cir. 1992), cert. denied, 113 S. Ct. 1367 (1993) 15
United States v. *Regilio*, 669 F.2d 1169 (7th Cir.), cert. denied, 457 U.S. 1133 (1982) 16
United States v. *Russell*, 971 F.2d 1098 (4th Cir. 1992), cert. denied, 113 S. Ct. 1013 (1993) 8
United States v. *Taylor*, 997 F.2d 1551 (D.C. Cir. 1993) 7-8, 14
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951) 21
Watkins v. *Ponte*, 987 F.2d 27 (1st Cir. 1993) 15
Whiteside v. *Parke*, 705 F.2d 869 (6th Cir.), cert. denied, 464 U.S. 843 (1983) 8-9
Williams v. *United States*, 271 F.2d 703 (4th Cir. 1959) 7

Cases—Continued:

	Page
Wilson v. *United States*, 232 U.S. 563 (1914)	19, 20
Winship, In re, 397 U.S. 358 (1970)	5

Constitution:

U.S. Const.	
Due Process Clause	1, 5-6, 11, 16, 17

Miscellaneous:

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Miscellaneous—Continued:

	Page
Shapiro, *"To a Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 Hastings L.J. 153 (1986)	18
Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299 (1977)	6
U.S. Eleventh Circuit District Judges Ass'n, *Pattern Jury Instructions, Criminal Cases* (1985)	2a
U.S. Fifth Circuit District Judges Ass'n, *Pattern Jury Instructions, Criminal Cases* (1990)	1a
U.S. Sixth Circuit District Judges Ass'n, *Pattern Criminal Jury Instructions* (1991)	1a
9 J. Wigmore, *Evidence* (J. Chadbourn rev. ed. 1981)	6, 10
Young Lawyers Section of the Bar Association of the District of Columbia, *Criminal Jury Instructions* (3d ed. 1978)	3a

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-8894

CLARENCE VICTOR, PETITIONER

v.

STATE OF NEBRASKA

No. 92-9049

ALFRED ARTHUR SANDOVAL, PETITIONER

v.

STATE OF CALIFORNIA

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA AND THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The Due Process Clause requires the government to prove a defendant's guilt beyond a reasonable doubt in every criminal case. The question of how the reasonable doubt standard should be presented to the jury will therefore affect every federal prosecution tried to a jury.

STATEMENT

1. *Victor* v. *Nebraska*. Clarence Victor was convicted by a jury of murder in the first degree and was sentenced to death. The Nebraska Supreme Court affirmed petitioner's conviction and sentence on direct appeal, 457 N.W.2d 431 (1990), and this Court denied certiorari, 498 U.S. 1127 (1991). Victor then sought post-conviction relief, which was denied first by the trial court and then by the Nebraska Supreme Court. 494 N.W.2d 565 (1993). This Court granted Victor's petition for a writ of certiorari on September 28, 1993. J.A. 44.

At trial, the court instructed the jury on the meaning of reasonable doubt as follows, J.A. 11 (Ninth Instruction):

> "Reasonable doubt" is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

2. *Sandoval* v. *California*. Alfred Arthur Sandoval was convicted by a jury on four counts of first degree murder and on one count of attempted murder. The jury sentenced him to death on one murder count and to life imprisonment without the possibility of parole on the remaining murder counts. The California Supreme Court affirmed petitioner's convictions and sentence. J.A. 95-149. This Court granted the petition for a writ of certiorari on September 28, 1993, and consolidated the case with *Victor* v. *Nebraska*, No. 92-8894. J.A. 151.

At the guilt phase, the trial court instructed the jury on the meaning of reasonable doubt as follows, J.A. 49:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

At the penalty phase, the court similarly instructed the jury as follows, J.A. 93:

As to any crime or criminal act of which defendant is accused as a factor in aggravation, he is presumed innocent until the contrary is proved beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of any crime or criminal acts of which defendant is accused used an aggravating factor.

SUMMARY OF ARGUMENT

A. Due process does not require "reasonable doubt" to be defined for juries. There has long been disagreement over the wisdom of attempting to define the term. This Court has said that attempts to explain the concept of reasonable doubt ordinarily do not clarify it for the jury, and authorities such as Dean Wigmore have concluded that attempted definitions add nothing to the jury's understanding of the term and may be confusing.

B. Where courts choose to define reasonable doubt, the Constitution does not require that a particular jury instruction be given. Rather, due process tolerates a broad range of definitions. This Court has approved definitions that characterize "reasonable doubt" as "a doubt based on reason" and that define "proof beyond a reasonable doubt" as proof to a "moral certainty." The lower federal courts traditionally have given trial courts broad latitude to define reasonable doubt, and some of them have drafted

model jury instructions, all of which differ to some degree, and all of which permissibly define the term.

C. The jury instructions in this case do not run afoul of *Cage* v. *Louisiana*, 498 U.S. 39 (1990). The principal vice of the jury instruction denounced in *Cage* was the language equating a "reasonable doubt" with a "substantial" doubt and with a "grave" doubt. Neither the instruction used in *Victor* v. *Nebraska* nor the instruction given in *Sandoval* v. *California* made that erroneous equation. The use of the term "moral certainty" was disapproved in *Cage*, but the use of that term, in proper context, is not error. This Court's pre-*Cage* precedents have approved the use of that term, and it is likely that, if anything, jurors interpret that phrase to impose a heightened standard for reasonable doubt, not a lower one.

ARGUMENT

THE JURY INSTRUCTIONS GIVEN IN THESE CASES ON THE MEANING OF REASONABLE DOUBT DID NOT VIOLATE THE DUE PROCESS CLAUSE

Under the Due Process Clause, no one may be convicted of a crime except upon proof beyond a reasonable doubt of every element of a charged offense. *In re Winship*, 397 U.S. 358 (1970); *Jackson* v. *Virginia*, 443 U.S. 307 (1979). The question in these cases is whether the jury instructions on the meaning of the term "reasonable doubt" violated the Due Process Clause by lightening the prosecution's burden of proof. In our view, the instructions did not have that effect.

Proper analysis of this case involves three questions: The first question is whether the Due Process

Clause requires a trial court to define the reasonable doubt standard for the jury. The second is how large a range of definitions the Due Process Clause will tolerate. The third is whether the jury instructions given here fell beyond that range. In particular, the issue is whether the Court's per curiam opinion in *Cage* v. *Louisiana*, 498 U.S. 39 (1990), requires that the judgments below be set aside.

A. The Due Process Clause Does Not Require A Trial Court To Define For The Jury The Meaning Of "Reasonable Doubt"

1. The rule that criminal defendants must be found guilty beyond a reasonable doubt "dates at least from our early years as a Nation." *In re Winship*, 397 U.S. at 361; accord *Apodaca* v. *Oregon*, 406 U.S. 404, 412-413 & n.6 (1972) (plurality opinion).[1] By contrast, there has emerged no settled view that reasonable doubt must be defined for juries. See, *e.g.*, 9 J. Wigmore, *Evidence* § 2497, at 405 (J. Chadbourn rev. ed. 1981); 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 1.8(f), at 80 (1986). During the 19th century, some courts attempted to define reasonable doubt, while others concluded that it was unwise to do so. Compare, *e.g.*, *Commonwealth* v. *Costley*, 118 Mass. 1, 24 (1875) (attempting to define reasonable doubt) (Gray, C.J.), with *State* v. *Sauer*, 38 N.W. 355, 356 (Minn. 1888) ("The term

[1] In this country, the reasonable doubt rule dates back perhaps as far as 1770 and received widespread application by the mid-19th century. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U.L. Rev. 507, 515-524 (1975); Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299, 1301-1302 & n.9 (1977).

'reasonable doubt' is almost incapable of any definition which will add much to what the words themselves imply.") (Mitchell, J.); see *State* v. *Ostrander*, 18 Iowa 435, 458-459 (1865).

This Court's precedents dispel any notion that the Constitution requires a court to define reasonable doubt for the jury. In *Miles* v. *United States*, 103 U.S. 304, 312 (1880), the Court stated that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." The Court has reaffirmed that view on several occasions. See *Holland* v. *United States*, 348 U.S. 121, 140 (1954); *Dunbar* v. *United States*, 156 U.S. 185, 199 (1895); see also *Hopt* v. *Utah*, 120 U.S. 430, 440 (1887) ("an instruction to the jury that they should be satisfied of the defendant's guilt beyond a reasonable doubt [has] often been held sufficient, without further explanation").

2. Some authorities from earlier in this century hold (or state in dictum) that it is error for a trial court not to define reasonable doubt for the jury. See *Friedman* v. *United States*, 381 F.2d 155, 160 (8th Cir. 1967) (dictum); *Williams* v. *United States*, 271 F.2d 703, 705 (4th Cir. 1959) (dictum); *Blatt* v. *United States*, 60 F.2d 481, 481 (3d Cir. 1932); *Nanfito* v. *United States*, 20 F.2d 376, 378 (8th Cir. 1927); *Schencks* v. *United States*, 2 F.2d 185, 187 (D.C. Cir. 1924). That view, however, is not the modern understanding.

The current state of the law in the federal system is as follows: Three circuits take the view that the trial judge should not define reasonable doubt for the jury, since the definition is likely to add little to the jury's understanding of the concept and may in some instances lead to jury confusion. See *United States* v.

Glass, 846 F.2d 386, 387 (7th Cir. 1988);[2] *United States* v. *Moss*, 756 F.2d 329, 333 (4th Cir. 1985);[3] *Thompson* v. *Lynaugh*, 821 F.2d 1054, 1060-1061 (5th Cir.), cert. denied, 483 U.S. 1035 (1987). Five other courts of appeals have held that it is not error for a district court to refrain from defining a "reasonable doubt." See *United States* v. *Taylor*, 997 F.2d 1551, 1557-1558 (D.C. Cir. 1993);[4] *United States* v. *Nolasco*, 926 F.2d 869, 872 (9th Cir.) (en banc), cert. denied, 112 S. Ct. 111 (1991); *United States* v. *Olmstead*, 832 F.2d 642, 646 (1st Cir. 1987), cert. denied, 486 U.S. 1009 (1988); *United States* v. *Ivic*, 700 F.2d 51, 68-69 (2d Cir. 1983); cf. *Whiteside* v. *Parke*, 705 F.2d 869, 871-873 (6th Cir.), cert. denied,

[2] The Seventh Circuit has pattern jury instructions that do not define reasonable doubt and recommend against doing so. The Seventh Circuit's instructions state that "[t]he Committee recommends that no instruction be given defining 'reasonable doubt.' The phrase 'reasonable doubt' is self-explanatory and is its own best definition. Further elaboration [tends to] weaken and make imprecise the existing phrase." *Federal Criminal Jury Instructions of the Seventh Circuit* 2.07 (1980).

[3] The Fourth and Seventh Circuits are split as to whether reasonable doubt should be defined if the jury asks the court to do so. Compare *United States* v. *Russell*, 971 F.2d 1098, 1108 (4th Cir. 1992) (court should define if jury is "demonstrably confused or uncertain"), cert. denied, 113 S. Ct. 1013 (1993), with *United States* v. *Blackburn*, 992 F.2d 666, 668 (7th Cir.) (court should refuse jury requests for definition), cert. denied, 114 S. Ct. 393 (1993).

[4] The D.C. Circuit has expressly repudiated its earlier position. See *United States* v. *Taylor*, 997 F.2d at 1558 ("[W]e are now of the opinion that the greater wisdom may lie with the Fourth Circuit's and Seventh Circuit's instruction to leave to juries the task of deliberating the meaning of reasonable doubt.").

464 U.S. 843 (1983). In light of these more recent developments, the older decisions expressing the view that it is error not to define reasonable doubt are now of questionable authority.[5]

3. As the debate among the authorities strongly suggests, a trial court's refusal to define reasonable doubt does not violate due process, because it does not "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina* v. *California*, 112 S. Ct. 2572, 2577 (1922), quoting *Patterson* v. *New York*, 432 U.S. 197, 202 (1977). Even more today than in the past, the concept of reasonable doubt has become familiar to laymen throughout our society and ordinarily does not need embellishment by a court. As Judge Posner has noted, "deeply entrenched in the popular culture as it is, the term 'beyond a reasonable doubt' may be the single legal term that jurors understand best." *United States* v. *Hall*, 854 F.2d 1036, 1044 (7th Cir. 1988) (concurring opinion). Professor McCormick has made the same observation, stating that "[r]easonable doubt is a term in common use almost as familiar to jurors as to lawyers." 2 C. McCormick, *Evidence* § 341, at 447 (J. Strong ed. 4th ed. 1992).

The American Law Institute did not define reasonable doubt in the Model Penal Code, because it be-

[5] In addition, the relevant statements in *Friedman* and *Williams* are dicta, *Nanfito* and *Blatt* also relied on other bases for reversal, and *Schencks* is no longer good law. See page 8, note 4, *supra*. And, in any event, none of the early decisions cited above expressly based their analysis on the Constitution—as opposed to the federal common law governing jury instructions—so those decisions offer little by way of enlightenment regarding the requirements of due process.

lieved that definition of the standard "can add nothing helpful to the phrase." Model Penal Code § 1.12, Comment 190 (1985). Dean Wigmore likewise condemned the practice of giving elaborate definitions of reasonable doubt as "a useless one" that "should be abandoned." J. Wigmore § 2497, at 408-409.[6] See also, *e.g.*, *United States* v. *Ivic*, 700 F.2d at 69 (Friendly, J.) ("a century's experience has confirmed the wisdom of the Supreme Court's observation" in *Miles* that reasonable doubt definitions are unhelpful); C. McCormick § 341, at 447 ("It is an ancient maxim that all definitions are dangerous.").[7] Under

[6] Dean Wigmore explained: "[W]hen anything more than a simple caution and a brief definition is given, the matter tends to become one of mere words, and the actual effect upon the jury, instead of being enlightenment, is likely to be rather confusion, or, at the least, a continued incomprehension. In practice, these detailed amplifications of the doctrine have usually degenerated into a mere tool for counsel who desire to entrap an unwary judge into forgetfulness of some obscure precedent, or to save a cause for a new trial by quibbling, on appeal, over the verbal propriety of a form of words uttered or declined to be uttered by the judge. The effort to perpetuate and develop these elaborate unserviceable definitions is a useless one, and serves today chiefly to aid the purposes of the tactician. It should be abandoned." J. Wigmore § 2497, at 406-409.

[7] There is no consensus in the psychological literature about the impact of reasonable doubt instructions upon jury verdicts. See Kerr, Atkin, Stasser, Meek, Holt & Davis, *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors*, 34 J. Personality & Soc. Psychology 282, 291 (1976) ("mock jurors' verdicts may indeed be affected by a judge's instructions concerning reasonable doubt"). But see Cornish & Sealy, *Juries and the Rules of Evidence*, 1973 Crim. L. Rev. 208, 222 (variations in reasonable doubt instructions had "little effect" upon

these circumstances, it cannot be said that a trial court's decision not to instruct the jury on the meaning of reasonable doubt violates any principle fundamental to the fair operation of a criminal justice system under our Constitution.

B. The Due Process Clause Tolerates A Range Of Definitions Of "Reasonable Doubt"

Since the Due Process Clause does not require courts to define reasonable doubt for a jury, it follows that there is no single definition that is constitutionally required. At the same time, the Due Process Clause does not forbid trial courts from defining a reasonable doubt; the history discussed above shows that there has never been a consensus that it is improper for trial courts to define reasonable doubt for the jury. We submit, therefore, that when a trial court instructs a jury as to the meaning of reasonable doubt, the court may select from a broad range of acceptable definitions. See C. McCormick § 341, at 447 (a reasonable doubt definition is proper if "in terms *locally approved*.") (emphasis added); *Becher* v. *United States*, 5 F.2d 45, 51 (2d Cir. 1924) (L. Hand, J.) ("It is enough if it appears that the jury has been told that the prosecu-

simulated jury verdicts). Compare also Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 Law & Soc'y Rev. 153, 189-191 (1982) (instructions improved juror comprehension, but not application, of reasonable doubt standard); Kramer & Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. Mich. J.L. Ref. 401, 414 (1990) (instructions "did little" to improve juror understanding of certain aspects of the meaning of reasonable doubt).

tion must establish all the facts to the required degree of satisfaction of the jury, and there is no fixed way in which this need be communicated, so long as that idea is evident."), cert. denied, 267 U.S. 602 (1925). We believe that the Constitution requires only that, "taken as a whole, the instructions correctly convey[] the concept of reasonable doubt to the jury." *Holland* v. *United States*, 348 U.S. at 140.

Many attempts have been made to define reasonable doubt. The most famous and influential early attempt appeared in *Commonwealth* v. *Webster*, 59 Mass. (5 Cush.) 295, 320 (1850), where Chief Justice Shaw defined a reasonable doubt as follows:

> [W]hat is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not a mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. * * * [T]he evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt * * *.

Over the years since then, this Court has recited or approved a variety of formulations defining reasonable doubt. In *Jackson* v. *Virginia*, 443 U.S. at 317, the Court said that "[a] 'reasonable doubt,' at

a minimum, is one based upon 'reason.'" Accord *Johnson* v. *Louisiana*, 406 U.S. 356, 360 (1972). In *Hopt* v. *Utah*, *supra*, the charge to the jury stated that "a reasonable doubt is a doubt based on reason" and that the defendant should be found not guilty "upon any reasonable hypothesis consistent with the defendant's innocence." 120 U.S. at 439. The charge also told the jury that if "you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt." *Ibid.* The Court upheld that jury instruction, calling it "as just a guide to practical men as can well be given; and if it were open to criticism it could not have misled the jury, when considered in connection with the further charge, that if they could reconcile the evidence with any reasonable hypothesis consistent with the defendant's innocence they should do so." *Id.* at 441. The Court specifically approved the "own affairs" portion of the instruction. See *id.* at 439.

In *Dunbar* v. *United States*, *supra*, the trial court told the jury, "I will not undertake to define a reasonable doubt further than to say that a reasonable doubt is not an unreasonable doubt—that is to say, by a reasonable doubt you are not to understand that all doubt is to be excluded; it is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the strong probabilities of the case, and the probabilities must be so strong as, not to exclude all doubt or possibility of error, but as to exclude reasonable doubt." 156 U.S. at 199. Of that instruction, this Court stated that "it gave all the definition of reasonable doubt which a court can be

required to give, and one which probably made the meaning as intelligible to the jury as any elaborate discussion of the subject would have done." *Ibid.*

The Court upheld another instruction in *Holland* v. *United States*, *supra*. There, the trial court instructed the jury that reasonable doubt is "the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon." 348 U.S. at 140. Although this Court was of the view that "the charge should have been in terms of the kind of doubt that would make a person hesitate to act," *ibid.*, it concluded that "the instruction as given was not of the type that could mislead the jury into finding no reasonable doubt when in fact there was some." *Ibid.*[5]

Several federal courts of appeals have adopted pattern jury instructions defining the term "reasonable doubt." The pattern instructions adopted by the Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits are reprinted in the appendix to this brief. Although the District of Columbia Circuit has noted with approval the practice of not defining a reasonable doubt for the jury, *United States* v. *Taylor*, 997 F.2d 1551, 1557-1558 (D.C. Cir. 1993), that court also has approved the use of the District of Columbia's Criminal Jury Instructions; that jury instruction also is reprinted in the attached appendix.

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[5] In *Taylor* v. *Kentucky*, 436 U.S. 478, 488 (1978), the Court criticized a trial court's definition of reasonable doubt as "a substantial doubt, a real doubt." Calling that definition "truncated," "confusing," and "hardly a model of clarity," the *Taylor* Court nonetheless allowed that the instruction was "perhaps not in itself reversible error." *Ibid.* The adequacy of the trial court's definition of reasonable doubt, however, was not at issue in *Taylor*.

The pattern instructions adopted by the courts of appeals differ somewhat from one to the next, but there has been no suggestion by this Court or any of the courts of appeals that only one formulation is permissible and the others constitute reversible error. To the contrary, whether following pattern instructions or acting on their own, trial courts have traditionally been given wide latitude to define "reasonable doubt," and the courts of appeals have repeatedly rejected challenges to varying definitions of that term. See, *e.g.*, *United States* v. *Edelin*, 996 F.2d 1238, 1242-1243 (D.C. Cir. 1993) (not "a speculation or suspicion"); *United States* v. *Dale*, 991 F.2d 819, 853 (D.C. Cir.) ("a doubt for which you can give a reason"), cert. denied, 114 S. Ct. 286 (1993); *Watkins* v. *Ponte*, 987 F.2d 27, 31-32 (1st Cir. 1993) (not "foolish" or "fanciful" doubt); *United States* v. *Daniels*, 986 F.2d 451, 457 (11th Cir. 1993) ("a real doubt"); *United States* v. *Harris*, 974 F.2d 84, 85 (8th Cir. 1992) ("not the mere possibility of innocence"); *United States* v. *Polan*, 970 F.2d 1280, 1286 (3d Cir. 1992) (an "honest doubt" and "not a fanciful doubt"), cert. denied, 113 S. Ct. 1367 (1993); *United States* v. *Barrera-Gonzales*, 952 F.2d 1269, 1273 (10th Cir. 1992) ("a real possibility that [the defendant] is not guilty"); *Gaskins* v. *McKellar*, 916 F.2d 941, 952 (4th Cir. 1990) ("a substantial doubt" not "some imaginary doubt or some slight doubt"), cert. denied, 111 S. Ct. 2277 (1991); *Leecan* v. *Lopes*, 893 F.2d 1434, 1443 (2d Cir.) ("a doubt for which a reasonable man can give a valid reason" and "one founded on the evidence"), cert. denied, 496 U.S. 929 (1990); *United States* v. *Jorge*, 865 F.2d 6, 10 (1st Cir.) ("not a doubt suggested by the ingenuity of counsel"), cert. denied, 490 U.S. 1027

(1989); *United States* v. *Hall*, 854 F.2d 1036, 1038-1039 (7th Cir. 1988) (a "fair doubt as one 'based on reason and common sense'"); *Smith* v. *Bordenkircher*, 718 F.2d 1273, 1276-1277 (4th Cir. 1983) (a "good and substantial doubt" not "a mere vague, fanciful or imaginary doubt"), cert. denied, 466 U.S. 976 (1984); *United States* v. *Regilio*, 669 F.2d 1169, 1178 (7th Cir.) ("a doubt that is based on reason"), cert. denied, 457 U.S. 1133 (1982); *Bumpus* v. *Gunter*, 635 F.2d 907, 910 (1st Cir. 1980) ("a doubt in your mind that you can stand up in the jury room and argue with principle and integrity to your fellow jurors"), cert. denied, 450 U.S. 1003 (1981).

The wide range of instructions that have been upheld against constitutional challenge demonstrates that due process does not require the adoption of a single fixed model instruction on reasonable doubt, and that, in fact, the Due Process Clause permits the use of any formulation that does not manifestly undermine the level of firm confidence that jurors must have before they may find a fellow citizen guilty of a crime.

C. This Court's Decision in *Cage* v. *Louisiana* Does Not Require Reversal Of The Judgments Below

The petitioners in both *Victor* and *Sandoval* rely heavily on the Court's 1990 per curiam decision in *Cage* v. *Louisiana*, 498 U.S. 39, as the basis for reversal. In *Cage*, the jury was instructed that a reasonable doubt was "such doubt as would give rise to a grave uncertainty," that a reasonable doubt was "an actual substantial doubt," and that what was necessary to convict the defendant was a "moral

certainty" of his guilt. *Id.* at 40.[9] This Court reversed Cage's conviction, determining that "a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id.* at 41. The Court's decision in *Cage* does not control these cases, however, for several reasons.

1. The instructions given in these two cases have in common with the instruction given in *Cage* the use of the term "moral certainty" as part of the definition of reasonable doubt. *Cage*, however, should not be read to hold that a reference to "moral certainty," by itself, renders a reasonable doubt instruction unconstitutional. The primary culprit in the jury instruction denounced in *Cage* was the equation of "reasonable doubt" with "substantial doubt" and "grave uncertainty." 498 U.S. at 41 ("It is plain to us that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard."). The reference to "moral certainty" was criticized because it operated in conjunction with the references to substantial and

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[9] The instruction in *Cage* defined a reasonable doubt as

> "one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt*. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*."

498 U.S. at 40 (quoting 554 So. 2d 39, 41 (La. 1989); emphasis added by this Court).

grave doubt. *Ibid.* ("When those statements are then considered with the reference to 'moral certainty,' rather than evidentiary certainty, it becomes clear" that the instruction violates due process).

Reference to "moral certainty" has long been a standard component of jury instructions defining the concept of reasonable doubt. The use of that term, without more, has not been thought to suggest to the jury that the government has a reduced burden of proof. In fact, in common parlance a level of confidence "to a moral certainty" would ordinarily be viewed as even more exacting than a level of confidence "beyond a reasonable doubt." The use of the term "moral certainty" in defining reasonable doubt therefore does not *ipso facto* violate due process.

During the 18th and 19th centuries, the term "moral certainty" came to mean that, in the realm of human affairs, absolute certainty is not attainable. Shapiro, *"To a Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 Hastings L.J. 153, 192 (1986) ("Thus by the late eighteenth century the concepts of moral certainty and proof beyond a reasonable doubt were tightly linked together in the philosophical literature, in the legal treatises, and in discussions of law designed to reach the educated public."); Morano, 55 B.U.L. Rev. at 512. The influential 1850 decision by Chief Justice Shaw of the Massachusetts Supreme Judicial Court in *Commonwealth* v. *Webster*, *supra*, referred to "moral certainty" to express a very high degree of confidence, but less than absolute certainty. See also *Donnelly* v. *State*, 26 N.J.L. 601, 615 (1857); *State* v. *Hammonds*, 85 S.E.2d 133, 138 (N.C. 1954).

As the *Webster* case illustrates, jurists in the 19th century came to regard the phrases "to a moral certainty" and "beyond a reasonable doubt" as synonymous. See *Fidelity Mutual Life Ass'n* v. *Mettler*, 185 U.S. 308, 317 (1902) ("[p]roof to a 'moral certainty' is an equivalent phrase with 'beyond a reasonable doubt' "); *Hopt* v. *Utah*, 120 U.S. at 440 (same). Nor has the term lost that meaning in its modern usage. See *Schneble* v. *Florida*, 405 U.S. 427, 431 (1972) (equating "to a moral certainty" with "beyond a reasonable doubt" as a standard of guilt). This Court recently used the term "moral certainty" to denote a very high level of confidence. *City of Canton* v. *Harris*, 489 U.S. 378, 390 n.10 (1989); *McCleskey* v. *Kemp*, 481 U.S. 279, 308 n.29 (1987); see also *Brewer* v. *Williams*, 430 U.S. 387, 433-434 (1977) (White, J., dissenting).

This Court's precedents reflect and confirm the historical acceptance of the use of the term "moral certainty" in reasonable doubt instructions. In *Miles* v. *United States*, the Court reviewed a charge using the term "moral certainty." 103 U.S. at 309. The Court sustained that instruction, saying that "[t]he language used * * * was certainly very favorable to the accused, and is sustained by respectable authority." *Id.* at 312. In *Wilson* v. *United States*, 232 U.S. 563 (1914), the defendants objected to the trial court's definition of reasonable doubt in terms of moral certainty. See *id.* at 569-570. The trial court instructed the jury that, *id.* at 570:

> "[R]easonable doubt is that frame of mind which forbids you to say, all the evidence considered and weighed, 'I have an abiding conviction of the defendants' guilt' or as it has been

> expressed, 'I am convinced of the defendants' guilt to a moral certainty.' If you can say that you have such a conviction, then you have no reasonable doubt, and your verdict should be guilty. On the contrary, if that is your frame of mind, if you are in the frame of mind where if it was a matter of importance to you in your own affairs, away from here, you would pause and hesitate, before acting, then you have a reasonable doubt."

This Court upheld that instruction, stating that "[t]he argument here is that the instruction as given is faulty, because the court did not tell the jury that the Government must prove its case against defendants beyond a reasonable doubt. As we read the charge, it meant nothing less than that, and was sufficiently favorable to defendants." *Ibid.* See also *Perovich* v. *United States*, 205 U.S. 86, 92 (1907) (approving the instruction given in *Commonwealth* v. *Webster*, *supra*); *Agnew* v. *United States*, 165 U.S. 36, 51 (1897) (quoting, with apparent approval, an instruction defining reasonable doubt as "such a doubt arising from the evidence that leaves the minds of the jury in such a state that they cannot say, after having reviewed all the evidence, that they have an abiding conviction, to a moral certainty, of the guilt of the accused").

2. If it is constitutionally permissible to use the phrase "moral certainty" to define reasonable doubt, the judgment in *Sandoval* v. *California*, No. 92-9049, should be affirmed. The jury instruction in that case used the phrase "moral certainty," but not in conjunction with the other terms that this Court found fatal to the instruction given in *Cage*. The *Sandoval* jury instruction is therefore consistent with this Court's decisions in cases such as *Miles*, *Hopt*, and *Wilson*, and is not rendered constitutionally invalid under this Court's analysis in *Cage*.

The jury instruction in *Victor* v. *Nebraska*, No. 92-8894, more closely resembles the one given in *Cage*. Nonetheless, a close reading of the instructions in those two cases reveals two critical differences. First, the instruction in *Victor* did not refer to reasonable doubt as requiring "grave uncertainty," as did the jury charge in *Cage*. That distinction is an important one. Requiring jurors to convict unless they entertain a "grave uncertainty" about a defendant's guilt is likely to persuade the jury that more than a "'doubt' * * * based upon 'reason,'" *Jackson* v. *Virginia*, 443 U.S. at 317, is necessary to return a not guilty verdict.

Second, while the jury charge in *Victor* contained the "actual and substantial doubt" phrase used in the *Cage* jury charge, the instruction in *Victor* did not use that phrase independently. Rather, the jury instruction in *Victor* referred to "an actual and substantial doubt" only as part of a sentence that drew a contrast between such a doubt and one "arising from mere possibility, from bare imagination, or from fanciful conjecture." The context in which the phrase "actual and substantial doubt" was used is important. A lawyer might interpret the term "substantial" as referring to the "substantial evidence" standard that is commonly used in administrative law, see *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), but lay jurors are not likely to interpret the term in that manner. Instead, they are likely to construe the term "substantial," in the context of the *Victor* instruction, as referring to a doubt based on the evidence of record, because that term was contrasted with a doubt "arising from mere possibility, from

bare imagination, or from fanciful conjecture." So construed, the instruction in *Victor* does not run afoul of the Court's decision in *Cage*.

3. Finally, the Court's analysis in *Cage* may have been affected by what the Court has subsequently recognized as an incorrect standard of review. During the Term before *Cage* was decided, this Court in *Boyde* v. *California* 494 U.S. 370, 378-381 (1990), adopted a standard for reviewing jury instructions. The proper inquiry, the Court held, is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in" an unconstitutional manner. *Id.* at 380. In so ruling, the Court expressly rejected use of the standard applied in *Francis* v. *Franklin*, 471 U.S. 307 (1985), which asked whether a jury "could have" misapplied the instructions. 494 U.S. at 378. In *Cage*, however, the Court applied the standard of review that it had first articulated in *Francis*, but then had later rejected in *Boyde*. 498 U.S. at 41 ("In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole. *Francis* v. *Franklin*, 471 U.S. 307, 316 (1985)."). The Term after *Cage*, the Court recognized that it had applied the wrong standard of review in that case, and it reaffirmed that the standard of review articulated in *Boyde* is the correct one. *Estelle* v. *McGuire*, 112 S. Ct. 475, 482 n.4 (1991). Thus, particularly when the instructions in these cases are analyzed under the proper standard of review, *Cage* cannot be said to require reversal of petitioners' convictions.

CONCLUSION

The judgments of the Supreme Court of Nebraska and the Supreme Court of California should be affirmed.

Respectfully submitted.

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DECEMBER 1993

APPENDIX

Several courts of appeals have pattern jury instructions defining the reasonable doubt standard. The Fifth Circuit's definition is as follow:

> A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

U.S. Fifth Circuit District Judges Ass'n, *Pattern Jury Instructions, Criminal Cases* 1.06 (1990). See also *United States* v. *Alonzo*, 681 F.2d 997 (5th Cir.), cert. denied, 459 U.S. 1021 (1982) (approving that instruction).

The Sixth Circuit's definition is as follows:

> (4) * * * Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. Possible doubts or doubts based purely on speculation are not reasonable doubts. A reasonable doubt is a doubt based on reason and common sense. * * *
>
> (5) Proof beyond a reasonable doubt means proof which is so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own lives. * * *

U.S. Sixth Circuit District Judges Ass'n, *Pattern Criminal Jury Instructions* 1.03 (1991). See also *United States* v. *Goodlett*, 3 F.3d 976, 979 (6th Cir. 1993) (expressing approval of that instruction).

The Eighth Circuit's definition is as follows:

> A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit 3.11 (1922).

The Ninth Circuit's definition is as follows:

> A reasonable doubt is a doubt based upon reason and common sense, * * *. Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty.

Manual of Model Criminal Instructions for the Ninth Circuit 3.03 (1992).

The Eleventh Circuit's definition is as follows:

> A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.
>
> Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your affairs.

U.S. Eleventh Circuit District Judges Ass'n, *Pattern Jury Instructions, Criminal Cases* 3 (1985). See also *United States* v. *Daniels*, 986 F.2d 451, 456 (11th

Cir. 1993) (upholding instruction that "closely tracks" this language). The Eleventh Circuit's definition is identical to the Fifth Circuit's with the exception of the word "real" before "doubt" in the first sentence.

According to the District of Columbia's "Red Book":

> Reasonable doubt, as the name implies, is a doubt based on reason, a doubt for which you can give a reason. It is such doubt as would cause a juror, after careful and candid and impartial consideration of all the evidence, to be so undecided that he cannot say that he has an abiding conviction of the defendant's guilt. It is such doubt as would cause a reasonable person to hesitate or pause in the graver or more important transactions of life. However, it is not a fanciful doubt nor a whimsical doubt, nor a doubt based on conjecture. It is a doubt which is based on reason. The government is not required to establish guilt beyond all doubt, or to a mathematical certainty or a scientific certainty. Its burden is to establish guilt beyond a reasonable doubt.

Young Lawyers Section of the Bar Association of the District of Columbia, *Criminal Jury Instructions* 2.09 (3d ed. 1978). See also *United States* v. *Dale*, 991 F.2d 819, 853 (D.C. Cir.) (upholding use of that instruction), cert. denied, 114 S. Ct. 286 (1993).

The leading treatise on federal jury instructions defines reasonable doubt as follows:

> It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt

based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.

1 E. Devitt, C. Blackmar, M. Wolff & K. O'Malley, *Federal Jury Practice and Instructions* § 12.10, at 354 (4th ed. 1992).

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No. 92-9049

92-8994

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALFRED ARTHUR SANDOVAL,

PETITIONER,

v.

STATE OF CALIFORNIA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CALIFORNIA

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE*, CALIFORNIA DISTRICT ATTORNEYS' ASSOCIATION, IN SUPPORT OF THE STATE OF CALIFORNIA

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QUESTION PRESENTED

Was petitioner deprived of due process and a fair jury trial by the use of a constitutionally defective reasonable doubt instruction which invited the jury to base its verdict on improper "moral" considerations rather than on an evidentiary evaluation?

TABLE OF CONTENTS

		Pages
QUESTION PRESENTED		i
TABLE OF CONTENTS		ii
TABLE OF AUTHORITIES		iii
MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE STATE OF CALIFORNIA		1
INTEREST OF *AMICUS CURIAE*		2
SUMMARY OF ARGUMENT		5
INTRODUCTION		6
I	CONSIDERED AS A WHOLE, IT IS UNLIKELY THAT CALJIC INSTRUCTION 2.90 WOULD MISLEAD A JURY	6
II	EVEN CONSIDERED IN ISOLATION, THE USE OF THE WORD "MORAL" IN CALJIC INSTRUCTION 2.90 DOES NOT DILUTE THE DUE PROCESS RIGHT STANDARD OF PROOF "BEYOND A REASONABLE DOUBT"	9
III	IF THE CHARGE TO THE JURY IS CONSIDERED AS A WHOLE, IT IS CLEAR THAT NO REASONABLE JURY WOULD LIKELY BE MISLED	12
CONCLUSION		16

TABLE OF AUTHORITIES

CASES	Pages
Boyde v. California, __ U.S. __, 110 S.Ct. 1190, 1198 (1990)	5, 7
Bruce v. State, 616 A.2d 392, 403 (Md. 1992)	11
Cage v. Louisiana, __ U.S. __, 111 S.Ct. 328, 329 (1990)	7
Commonwealth v. Rankin, 311 A.2d 660, 661 fn.1 (Pa. Super. 1973)	10
Crocker v. State, 573 S.W.2d 190, 207. (Tex.Crim.App. 1978)	11
Cupp v. Naughten, 414 U.S. 141, 146-47 (1973)	12
Dominick v. State, 433 S.E.2d 405 (Ga.App. 1993)	11
Erving v. State, 427 So.2d 701, 704-05 (Miss. 1983)	10
Evans v. State 499 A.2d 1261, 1287 (Md. 1985)	11
Hamling v. United States, 418 U.S. 87, 107-08 (1974)	7
Holland v. United States, 348 U.S. 121, 138-39 (1954)	11

In re Winship, 397 U.S. 362 (1970)	6, 8
Jackson v. Virginia, 443 U.S. 307 (1979)	6, 10
Monk v. Zelez, 901 F.2d 885, 890 (10th Cir. 1990)	10
Moore v. State, 318 S.E.2d 172, 173 (Ga.App. 1984)	10
People v. Hall, 396 P.2d 700 (Cal. 1964)	6, 8
People v. Johnson, 842 P.2d 1, 46 fn.1 (Cal. 1992)	11
People v. Rossman 463 N.Y.S.2d 891, 893 (N.Y.App.Div. 1983)	10
People v. Sammons 478 N.W.2d 901, 912 (Mich.App. 1991)	11
Rhinehart v. State, 299 S.W. 755, 757 (Ark. 1927)	10
Smith v. State, 394 So.2d 882, 884-85 (Miss. 1981)	11
State v. Butler, 543 A.2d 270, 278 (Conn. 1988)	11
State v. Desrosiers, 559 A.2d 641, 645 (R.I. 1989)	10

State v. Galvan,
368 N.W.2d 400, 403 (Minn.App. 1985) 11

State v. Oliver,
354 S.E.2d 527, 541 (N.C.App. 1987) 11

State v. Payne,
289 N.W.2d 173, 179 (Neb. 1980) 10

State v. Ramey,
60 S.E.2d 66, 72 (S.C. 1950) 10

State v. Reid,
267 P.2d 986, 990 (Mont. 1954) 10

State v. Udstuen,
345 N.W.2d 766, 768 (Minn. 1984) 11

State v. Watson,
240 S.E.2d 440, 446 (N.C. 1978) 10

Sullivan v. Louisiana __ U.S. __,
113 S.Ct. 2078 (1993) 3, 7

United States v. Park,
421 U.S. 658 (1975) 12

United States v. Smaldone,
485 F.2d 1333, 1348 (10th Cir. 1973) 10

United States v. Tobin,
576 F.2d 687, 694 (5th Cir. 1978) 10

Wintjen v. State 398 A.2d 780,
781 (Del. 1979) 11

JURY INSTRUCTIONS

California Jury Instructions,
Criminal

Section 1.00 13, 14

Section 1.01 12

Section 1.02 14

Section 2.09 14

Section 2.20 8, 14

Section 2.21.1 8

Section 2.61 15

Section 2.80 14

Section 2.91 15

Section 8.50 15

Section 8.71 15

Section 8.72 15

Section 8.80 15

Section 8.81.3 15

Section 2.00 14

Section 2.90 5-9, 12, 14

District of Columbia, Criminal Jury Instruction

Section 2.09 (3rd ed. 1978) 11

Connecticut Criminal Jury Instruction

David M Borton and Leonard Orland, Criminal Jury Instructions, in 5 *Connecticut Practice* section 2.9 at 50-51 (1986 and Supp. 1993) 11

Georgia Suggested Pattern Jury Instruction

Part 2.D. (2d. ed. 1991) 11

Hawaii Standard Jury Instruction

Section 3.02 11

Maryland Criminal Jury Instruction

Section 2:02 (1991) 11

So. Dakota Pattern Jury Instructions, Criminal

Section 1-6-1 11

Tennessee Pattern Jury Instruction Criminal

Section 2.03 (3d.ed. 1992) 11

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 37.1 2

Rule 37.3 1

Rule 37.5 2

MISCELLANEOUS

Black's Law Dictionary 1827 (Oxford, 1993) 10, 12

The New Shorter Oxford English Dictionary 1827 (Oxford, 1993) 9, 10

The Oxford English Dictionary, "M," 654 (Compact Edition, 1971) 10

No. 92-9049

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

ALFRED ARTHUR SANDOVAL,

PETITIONER,

v.

STATE OF CALIFORNIA,

RESPONDENT.

MOTION FOR LEAVE TO FILE
BRIEF OF *AMICUS CURIAE*
IN SUPPORT OF
THE STATE OF CALIFORNIA

Pursuant to Rule 37.4, Rules of the Supreme Court of the United States, ***amicus curiae***, the Appellate Committee of the California District Attorneys' Association, including the District Attorney of Los Angeles County, hereby moves for leave of this Court to file the attached ***amicus curiae*** brief in support of the State of California.

Pursuant to Rule 37.3, Rules of the Supreme Court of the United States, ***amicus*** sought consent from petitioner in this case. Petitioner's counsel agreed by telephone to the Committee's request to file an ***amicus*** brief in support of respondent in the instant case, and counsel for the Committee sent a consent form to counsel for petitioner, together with a self-addressed, stamped envelope. Counsel for petitioner has failed to return the consent form and, as of the date and time this brief was submitted for printing, had not responded to repeated telephone calls from counsel for the Committee.

The California District Attorneys' Association is an association of District Attorneys who are authorized law officers of the State of California and of the counties they represent, including the County of Los Angeles, such counties being political subdivisions of the state. Thus, had the members of this association individually and separately sought to file this brief, consent would not have been required. *See*, Rule 37.5, Rules of the Supreme Court of the United States.

In the event that this Court is not inclined to grant leave to file this brief on behalf of the Association, *amicus* respectfully requests that it be filed on behalf of the District Attorney of Los Angeles County alone under Rule 37.5.

Amicus believes that, pursuant to Rule 37.1, Rules of the Supreme Court of the United States, the *amicus* brief offered herein brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties, and will be of considerable help to the Court. It addresses the use of the term "moral" in the context of the California "reasonable doubt" jury instruction, considers how the phrases used have been interpreted by other states and reference authorities, and examines the role that these phrases play when considered in light of the entire charge to the jury.

INTEREST OF *AMICUS CURIAE*

The Appellate Committee of the California District Attorneys' Association is a committee created by an association consisting of the District Attorneys of the State of California and their deputies. It has been established in order to utilize and coordinate the resources of District Attorneys throughout the State of California, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal cases. One member of the Association is the District Attorney of Los Angeles County. Upon review of the instant matter, the Committee, including a representative of the District Attorney of Los Angeles County, has concluded that the outcome of this case

may have profound impact upon the administration of criminal justice throughout California because it places in jeopardy every criminal conviction in the state not yet final. California's already-vastly overburdened criminal justice system tries more than 12,000 jury trials in a given year. 2 Judicial Council of California, *1993 Annual Report* p.56 (felonies), p.78 (misdemeanors) (1993). This figure includes more than 5,000 felony trials. *Id.*, at 56. Pursuant to this Court's rulings in *Griffith v. Kentucky*, 479 U.S. 314 (1987) and *Sullivan v. Louisiana* __ U.S. __, 113 S.Ct. 2078 (1993), *all* of these cases not yet final on appeal may be subject to per se reversal. This would include not only all recent criminal judgments following a jury trial, but all criminal cases pending on appeal in the six districts of the California Courts of Appeal. It would also include all pending criminal appeals before the Supreme Court, among them roughly 200 death-penalty appeals currently pending before that court. Gerald F. Uelman, *How the Justices Stack Up*, Daily Journal Report, June 4, 1993 at p.10. Many, if not most of these are from 5 to 10 years old, raising serious doubt as to the practicability of retrying those cases. In addition, as is discussed at length below, the Committee is convinced that California's standard jury instruction regarding reasonable doubt is Constitutionally sound. It is for these reasons that the Com-

mittee seeks leave to file the attached *amicus curiae* brief herein.

Respectfully submitted
on behalf of the

California District Attorneys
Association, and the District Attorney
of Los Angeles County

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SUMMARY OF ARGUMENT

Jury instructions should be read as a whole. Jurors do not parse every phrase of an instruction in the manner that lawyers might. The relevant standard for review of an allegedly ambiguous instruction is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, __ U.S. __, 110 S.Ct. 1190, 1198 (1990). Read in the context of the instruction at issue, the terms "moral evidence" and "moral certainty" are unlikely to confuse or mislead a jury.

Even read in isolation, the uses of the word "moral" in CALJIC instruction 2.90 are unlikely to mislead. "Moral evidence" merely focusses the jury's attention on the fact that the evidence in a criminal trial is, for the most part, human evidence, involving such issues as credibility, etc., rather than the sort of evidence which is absolutely determinable. The use of "moral certainty" emphasizes to the jury that, while absolute certainty is not required, in order to return a guilty verdict the jury must come to a subjective state of "near certitude."

The entire charge to the jury is to be read as a whole. A review of the instructions read in the instant case shows that, while the terms "moral evidence" and "moral certainty" are used but once and in passing, the phrase "beyond a reasonable doubt" is used repeatedly in California's pattern jury instructions as the touchstone for the determination of guilt.

INTRODUCTION

This Court has determined the fundamental Constitutional standard of proof applicable in criminal trials to be proof "beyond a reasonable doubt." *In re Winship*, 397 U.S. 362 (1970). In that case, the Court begins its analysis by tracing the use of the phrase, "beyond a reasonable doubt," from the late eighteenth century to the present. *Id.*, 397 U.S. at 361-63. The Court went on to conclude that, in light of the great interest of defendants in not being wrongfully found guilty, the "beyond a reasonable doubt" standard was required by the Due Process clause as "a prime instrument for reducing the risk of convictions resting on factual error." *Id.*, 397 U.S. at 363-64.

Almost a decade later, in *Jackson v. Virginia*, 443 U.S. 307 (1979), this Court described "beyond a reasonable doubt" as the applicable standard of proof because it "impress[es] upon the factfinder the need to reach a subjective state of ***near certitude*** of the guilt of the accused." *Id.*, at 315. This characterization of the Constitutional standard was anticipated fifteen years earlier by the California Supreme Court in *People* v. *Hall*, 396 P.2d 700 (Cal. 1964). *Id.*, at 705 ("To justify a criminal conviction, the trier of fact must be reasonably persuaded to a ***near certainty***.") (Traynor, C.J., for the court). As addressed below, the California pattern jury instruction regarding "reasonable doubt" (hereinafter "CALJIC 2.90") does not reduce or dilute the standard of proof of guilt, which both this Court and the courts of California have found Constitutionally mandated.

I

CONSIDERED AS A WHOLE, IT IS UNLIKELY THAT CALJIC INSTRUCTION 2.90 WOULD MISLEAD A JURY

The fundamentally false premise underlying petitioner's basic argument is that jurors minutely analyze every word of the instructions given to them, such as a constitutional scholar might do. It is settled that "jury instructions are to be judged as a whole, rather than by picking isolated phrases from them."

Hamling v. United States, 418 U.S. 87, 107-08 (1974); *and see*, *Cage v. Louisiana*, __ U.S. __, 111 S.Ct. 328, 329 (1990). Furthermore, this Court has recently determined that the standard for interpreting an ambiguous instruction is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, __ U.S. __, 110 S.Ct. 1190, 1198 (1990); *accord*, *Estelle v. McGuire* __ U.S. __, 112 S.Ct. 475, 482 fn.4 (1991) [disapproving the standard applied in *Cage*, *supra*].[1]

This Court explained its reasoning for laying down the rule in *Boyde*, *supra*, in part as follows:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with common sense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Id., at 110 S.Ct. 1198.

Furthermore, the contexts in which the phrases "moral evidence" and "moral certainty" are used in CALJIC instruction 2.90 are not such that these phrases would likely lead jurors astray. First, as to the phrase "moral evidence," it is used in parallel with "human affairs" in CALJIC instruction 2.90: "It [reasonable doubt] is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt." The effect of these two phrases – "human affairs" and "moral evidence" – used together is to emphasize that, as the trier of

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1. In *Sullivan v. Louisiana*, __ U.S. __, 113 S.Ct. 2078 (1993), this Court declined to apply the standard enunciated in *Boyde* and *Estelle* on the grounds that the state had "fail[ed] to raise this issue below." *Id.*, 113 S.Ct. at 2081 fn.1. By contrast, as soon as petitioner, with his case pending before the California Supreme Court, raised the issue of the alleged unconstitutionality of the "reasonable doubt" instruction in a supplemental brief, the State of California responded by expressly raising the *Boyde/Estelle* issue. Respondent's Reply to Appellant's Supplemental Brief to the California Supreme Court, p.4.

fact, the jury will not be concerned primarily with matters – e.g., scientific or philosophical – that can be definitively resolved by experiment or measurement, or which inhabit the realm of pure reason. Rather, the jury will be concerned with the much more problematic world of human evidence, where few truths are ascertainable with absolute certainty. In its deliberations, the jury will, for example, be called upon to judge the credibility of witnesses, often relying (at least in part) upon subtle clues such as demeanor or attitude. See CALJIC 2.20 (regarding credibility of witnesses). In so doing, the jury must be alert to the possibility that a witness may intentionally not tell the truth, but they must also allow for human frailties, such as forgetfulness or innocent misrecollection. See CALJIC 2.21.1 (making this point). In sum, the parallel usage of the terms "human affairs" and "moral evidence" serves to put the jurors on notice as to the nature of the evidence they will be evaluating in their deliberations and to emphasize that absolute certainty is not to be expected in such matters. Therefore, it is unlikely that a jury would be misled by the one-time use of the phrase "moral evidence," when considered in context.

Second, as to the use of "moral certainty" in CALJIC 2.90, this term is used in conjunction with the phrase "abiding conviction." Far from lowering the standard of proof, as petitioner alleges, the sentence in which these two phrases are used serves as a counterpoint to the immediately preceding sentence, addressing "possible or imaginary doubt." That is, although the jurors cannot expect absolute certainty, neither may they return a guilty verdict if they harbor serious subjective doubt; rather, they must come to an "*abiding conviction* to a moral *certainty*." As such, the two phrases used together embody that standard of a "need to reach a state of near certitude," or "near certainty," of guilt, which both this Court and the California Supreme Court have adopted as a measure of the standard of proof required by the Due Process clause. *In re Winship*, *supra*, 397 U.S. at 364; *People* v. *Hall*, *supra*, 396 P.2d at 705.

Third, California has not sat by idly or uncritically with regard to the present "reasonable doubt" instruction. On the contrary, as recently as 1987, the state legislature requested the committee responsible for California's pattern jury instructions (hereinafter, the "CALJIC Committee") to undertake a thorough reexamination of the present instruction and of "alternatives" to

it.[2] The CALJIC Committee undertook this reexamination of the instruction from several different perspectives. It noted the lack of empirical evidence that the instruction was confusing or ambiguous for jurors. CALJIC Report on Reasonable Doubt, 14-15 (bracket added). It also surveyed judges and lawyers in California who actually observed CALJIC 2.90 in use. It found "a substantial consensus among judges and lawyers . . . that there [should] be no change in the definition of reasonable doubt." *Id.*, at 44 (bracket added). The committee then surveyed jury instructions on reasonable doubt in all of the fifty states. *Id.*, at 15-34.[3] Based upon this careful review of the advantages and disadvantages of changing California's "reasonable doubt" instruction, the committee concluded that the present instruction should be retained. *Id.*, at 7-10.

II

EVEN CONSIDERED IN ISOLATION, THE USE OF THE WORD "MORAL" IN CALJIC INSTRUCTION 2.90 DOES NOT DILUTE THE DUE PROCESS RIGHT STANDARD OF PROOF "BEYOND A REASONABLE DOUBT"

The most recent, authoritative reference dictionary of the English language, published just this year, defines "moral certainty" to mean "a degree of probability so great as to admit of *no reasonable doubt*; *a practical certainty*." *The New Shorter*

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2. Committee on Standard Jury Instructions, Criminal of the Superior Court of Los Angeles, Report of the Committee on Standard Jury Instructions -- Criminal of the Los Angeles Superior Court to the California Legislature on Alternatives to the Reasonable Doubt Definition (1987), *reprinted at* Daily Journal, May 22, 1987 – No. 87-10, hereinafter, "CALJIC Report on Reasonable Doubt Instruction." The study was undertaken by the Committee on Standard Jury Instructions, Criminal of the Superior Court of Los Angeles County (commonly referred to as the "CALJIC Committee"), which is a committee of judges and attorneys responsible for California's pattern jury instructions in criminal law. Committee on Standard Jury Instructions, Criminal of the Superior Court of Los Angeles, *California Jury Instructions, Criminal* ["CALJIC"] (5th ed. 1988).

3. For example, the Committee's study reflected that, as of 1987, a dozen states used the phrase, "moral certainty." *Ibid.*

Oxford English Dictionary 1827 (Oxford, 1993). Similarly, *Black's Law Dictionary* defines "moral certainty" to mean:

> That degree of assurance which induces a man of sound mind to act, without doubt, upon the conclusions to which it leads. A high degree of impression of the truth of a fact, falling short of absolute certainty, but sufficient to justify a verdict of guilty, even in a capital case. Such signifies a probability sufficiently strong to justify action on it; a very high degree of probability, although not demonstrable, as a certainty. It has also been used as indicating a conclusion of the mind established *beyond a reasonable doubt*.

Id., 909 (5th ed. 1979).

And the *Oxford English Dictionary*, the most authoritative dictionary in the history of the English Language, defines the phrase in very similar language, as "a practical certainty resulting from moral evidence; a degree of probability so great as to admit of *no reasonable doubt*." *The Oxford English Dictionary*, "M,"654 (Compact Edition, 1971).

Many courts have expressly found the terms "moral certainty" and "moral evidence" to be synonymous. *Rhinehart v. State*, 299 S.W. 755, 757 (Ark. 1927); *State v. Desrosiers*, 559 A.2d 641, 645 (R.I. 1989); *Erving v. State*, 427 So.2d 701, 704-05 (Miss. 1983); *State v. Reid*, 267 P.2d 986, 990 (Mont. 1954); *State v. Payne*, 289 N.W.2d 173, 179 (Neb. 1980); *People* v. *Rossman* 463 N.Y.S.2d 891, 893 (N.Y.App.Div. 1983); *State v. Watson*, 240 S.E.2d 440, 446 (N.C. 1978); *Moore v. State*, 318 S.E.2d 172, 173 (Ga.App. 1984); *Commonwealth v. Rankin*, 311 A.2d 660, 661 fn.1 (Pa.Super. 1973); *State v. Ramey*, 60 S.E.2d 66, 72 (S.C. 1950).

Thus, the phrase, "moral certainty" in no way "dilutes" the burden of the state to prove a charge beyond a reasonable doubt. On the contrary, it serves to impress upon the jury the need for "near certitude" in their belief of a defendant's guilt before returning a guilty verdict. *Jackson v. Virginia*, 443 U.S., *supra*, at 315. In fact, some courts have expressed the view that "moral certainty" elevates the burden on the prosecution above "beyond a reasonable doubt." *United States v. Tobin*, 576 F.2d 687, 694 (5th Cir. 1978); *United States v. Smaldone*, 485 F.2d 1333, 1348 (10th Cir. 1973); *and see*, *Monk v. Zelez*, 901 F.2d 885, 890 (10th Cir. 1990). Indeed, many defendants have

appealed their cases, arguing that an instruction prescribing the "beyond a reasonable doubt" standard was not enough – that they had a *right* to have the jury instructed that they must find a defendant guilty to a "moral certainty." *E.g.*, *State v. Butler*, 543 A.2d 270, 278 (Conn. 1988); *Bruce v. State*, 616 A.2d 392, 403 (Md. 1992); *Evans v. State* 499 A.2d 1261, 1287 (Md. 1985); *People v. Sammons* 478 N.W.2d 901, 912 (Mich.App. 1991); *State v. Galvan*, 368 N.W.2d 400, 402-03 (Minn.App. 1985); *State v. Udstuen*, 345 N.W.2d 766, 768 (Minn. 1984); *Smith v. State*, 394 So.2d 882, 884-85 (Miss. 1981); *State v. Oliver*, 354 S.E.2d 527, 541 (N.C.App. 1987); *Crocker v. State*, 573 S.W.2d 190, 207 (Tex.Crim.App. 1978).

On the other hand, the phrase "moral certainty" serves to emphasize that we are dealing here in the realm of human affairs, not in a realm of abstractions. Other states emphasize this distinction in different terms. Some courts explain to the jury in the course of their "reasonable doubt" instruction that returning a guilty verdict does not require a "mathematical certainty" because in practical matters such as crime there is no such certainty. *See*, David M Bordon and Leonard Orland, *Criminal Jury Instructions*, in 5 *Connecticut Practice* §2.9 at 50-51 (1986 and Supp. 1993[4]); *Criminal Jury Instruction, District of Columbia* §2.09 (3rd ed. 1978) (*and see*, *Foreman v. United States*, 1993 WL 477614 at fn.2); Council of Superior Court Judges of Georgia, *Suggested Pattern Jury Instructions*, Part 2.D. (2d. ed. 1991); *Maryland Criminal Pattern Jury Instructions* 2:02 (1991); *and see*, *Holland v. United States*, 348 U.S. 121, 138-39 (1954). Other states emphasize that what is called for is not "absolute" certainty or freedom from "all" doubt. *See*, *Criminal Jury Instructions (Connecticut)*, *supra*, at §2.9; *Georgia Suggested Pattern Jury Instruction*, *supra*, at Part 2.D.; *Hawaii Standard Jury Instruction* No. 3.02; *South Dakota Pattern Jury Instructions, Criminal*, No. 1-6-1; *Tennessee Pattern Jury Instructions - Criminal* §2.03 (3d.ed. 1992); *see also*, *People v. Johnson*, 842 P.2d 1, 46 fn.1 (Cal. 1992); *Wintjen v. State* 398 A.2d 780, 781 (Del. 1979); *Dominick v. State*, 433 S.E.2d 405 (Ga.App. 1993).

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4. Petitioner incorrectly states that Connecticut has no pattern jury instructions. Petitioner's Brief on the Merits, p.A-2.

Similarly, "moral evidence" imports evidence of a practical, rather than mathematical or absolute nature. *Black's Law Dictionary* defines that phrase,

> [a]s opposed to "mathematical" or "demonstrative" evidence, this term denotes that kind of evidence which, without developing an absolute and necessary certainty, generates a high degree of probability or persuasive force. It is founded upon analogy or induction, experience of the ordinary course of nature or the sequence of events, and the testimony of men.

Id., at 909.

In sum, the employment of these terms, "moral certainty" and "moral evidence," even considered in isolation from the rest of the instruction, is unlikely to mislead a jury from its duty to apply the "beyond a reasonable doubt" standard of proof.

III

IF THE CHARGE TO THE JURY IS CONSIDERED AS A WHOLE, IT IS CLEAR THAT NO REASONABLE JURY WOULD LIKELY BE MISLED

It is the settled jurisprudence of this Court that the charge to the jury must be read as a whole. As the Court stated in *United States v. Park*, 421 U.S. 658 (1975), "`a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Id.*, at 674, quoting from *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973).[5] Reading the jury instructions in the instant case as a whole demonstrates that the jurors would not likely have been led astray by the passing use of the "moral evidence" and "moral certainty" in instruction 2.90.

Petitioner argues that "the term `moral certainty' . . . invites the jury to base their decision on feelings rather than facts, on emotion rather than on evidence." Petitioner's Brief on the Merits, at 25; *and see* pp.25-32 (*passim*). With regard to "moral evidence," petitioner claims that the term "connotes matters

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5. In fact, California's standard, pattern jury instructions expressly instruct jurors that they *must* consider the instructions as a whole. (CALJIC 1.01.)

relating to the ethics or morality of a particular situation, rather than the objective, verifiable facts comprising the situation." *Id.*, at 32-34. But when the "reasonable doubt" instruction is read in the context of the other instructions, it is clear that neither of these claims is justified.

The very first jury instruction generally given in criminal cases in California is CALJIC 1.00, the complete text of which is set out in the margin.[6] This pattern instruction is given in virtually all criminal jury trials, and was given in petitioner's case. Joint Appendix, at 51-52. *By its terms*, it instructs jurors that they "must not be influenced . . . by prejudice against" the defendant, and that they "must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." CALJIC 1.00. Thus, even assuming *arguendo* that "moral certainty" invites jurors to consider their "feelings" and "emotions," as petitioner contends, they have

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6. You have heard all the evidence [and the arguments of the attorneys], and now it is my duty to instruct you on the law that applies to this case.
[The law requires that I read the instructions to you.] [You will have these instructions in written form in the jury room to refer to during your deliberations.]

You must base your decision on the facts and the law.

You have two duties to perform. First, you must determine the facts from the evidence received in the trial and not from any other source. A "fact" is something proved directly or circumstantially by the evidence [or by stipulation. A stipulation is an agreement between attorneys regarding the facts]. Second, you must apply the law that I state to you, to the facts, as you determine them, and in this way arrive at your verdict [and any finding you are instructed to include in your verdict].

You must accept and follow the law as I state it to you, whether or not you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.

You must not be influenced by pity for a defendant or by prejudice against [him] [her]. You must not be biased against the defendant because [he] [she] has been arrested for this offense, charged with a crime, or brought to trial. None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that [he] [she] is more likely to be guilty than innocent. You must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences.

already been expressly instructed that that is one thing they "must not" do. Again, with regard to the assertion that "moral evidence" invites a jury to consider improper ethical considerations, Instruction 1.00 expressly directs the jurors that they

> must determine the facts from the evidence received in the trial and not from any other source. A "fact" is something proved directly or circumstantially by the evidence. Second, you must apply the law that I state to you, to the facts, as you determine them, and in this way arrive at your verdict.

CALJIC 1.00.

CALJIC instruction 2.00 goes on to define evidence and to distinguish between direct and circumstantial evidence. Many other instructions explain or direct the jury as to how to consider particular types of evidence and what factors are relevant to weighing that evidence. For example, at petitioner's trial, the jury was instructed that statements and questions by lawyers are not evidence. Joint Appendix, at 54 (CALJIC 1.02). They were instructed as to what specific factors may be used to evaluate the credibility of witnesses. Joint Appendix, at 60-61 (CALJIC 2.20). They were told that certain evidence was admitted for a limited purpose and could not be considered for any other purpose. Joint Appendix, at 58 (CALJIC 2.09). They were told how to weigh the testimony of expert witnesses. Joint Appendix, at 75 (CALJIC 2.80). The fact is that the practices and procedures which a jury must use in evaluating the evidence adduced at trial are carefully controlled and limited to evidence relevant to the determination of the defendant's guilt or innocence. Thus, there is no reasonable likelihood that one passing reference to "moral evidence" would mislead a jury from their duty.

Finally, it is fundamental to petitioner's claim that the due process requirement that the prosecution prove its case "beyond a reasonable doubt" has been reduced or diluted. But, reading the instructions as a whole shows that this is not so. "Moral evidence" and "moral certainty" are used but once, in CALJIC 2.90. The phrase, "beyond a reasonable doubt," by contrast, is used repeatedly in California's standard instructions as the touchstone for proof of guilt. Thus, the standard instruction regarding the defendant's right not to testify reads:

> In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove ***beyond a reasonable doubt*** every essential element of the charge against him. No lack of testimony on defendant's part will make up for a failure of proof by the People so as to support a finding against [him] [her] on any such essential element.

CALJIC 2.61.

The standard instruction regarding eye-witness identification reads:

> The burden is on the People to prove ***beyond a reasonable doubt*** that the defendant is the person who committed the crime with which [he] [she] is charged.
>
> *If*, after considering the circumstances of the identification . . . ***you have a reasonable doubt*** whether defendant was the person who committed the crime, you must give the defendant the benefit of that doubt and find [him] [her] not guilty.

CALJIC 2.91.

Again, the instruction distinguishing murder (the crime charged in the instant case) from manslaughter includes the following language: "To establish that a killing is murder . . . and not manslaughter, the burden is on the People to prove ***beyond a reasonable doubt*** each of the elements of murder . . . ." CALJIC 8.50.

Each of these instructions was given at petitioner's trial. Joint Appendix, at 72, 79 and 95. The jury was also instructed that, if they have "a reasonable doubt" as to whether the crime is first or second degree murder, they must return a verdict in the second degree. Joint Appendix, at 97 (CALJIC 8.71). They were given a similar instruction with regard to the distinction between murder and manslaughter. Joint Appendix, at 98 (CALJIC 8.72). In fact, the jurors were told, expressly, that the standard of proof was "beyond a reasonable doubt," at least six times in six different instructions. *See also*, Joint Appendix, at 118 (CALJIC 8.72 and CALJIC 8.80 and 8.81.3 as modified by the trial court). And this does not count how many other times they were given the corresponding phrase (in one form or another) that "if you [the jury] have a reasonable doubt" you must find the defendant not guilty, or guilty of the lesser crime,

etc. Under these circumstances, or anything like them, no juror would be confused as to what the applicable standard of proof was – that is, *beyond a reasonable doubt*.

CONCLUSION

For the reasons stated above, and in view of the potentially serious consequences for the criminal justice systems of California and of several of its sister states, amicus urges this Court to affirm the ruling of the California Supreme Court.

Respectfully submitted
on behalf of the
California District Attorneys
Association, and the District Attorney
of Los Angeles County

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALFRED ARTHUR SANDOVAL, *Petitioner*,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*,

---- AND ----

CLARENCE VICTOR, *Petitioner*,

vs.

THE PEOPLE OF THE STATE OF NEBRASKA, *Respondent*.

On Writs of Certiorari to the Supreme Courts of the States of California and Nebraska

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MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Did *Cage* v. *Louisiana*, 498 U. S. 39 (1990) extend the Due Process Clause so much that the California and Nebraska reasonable doubt instructions are unconstitutional?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

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vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*,

---- AND ----

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THE PEOPLE OF THE STATE OF NEBRASKA, *Respondent*.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF RESPONDENTS

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of respondents in the above-captioned cases. Counsel for petitioner Sandoval has refused consent; counsel for all other parties have consented.

In the accompanying brief, *amicus curiae* argues that the California and Nebraska reasonable doubt instructions do not violate due process.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present cases present the question of the continued validity of reasonable doubt instructions used in California and Nebraska. Overturning these instructions would require an unnecessary expansion of the Due Process Clause and would severely disrupt the criminal justice systems of several states. This needless disruption is contrary to the interests CJLF was formed to protect.

For the foregoing reasons, *amicus curiae* requests leave to file its brief.

December, 1993

Respectfully submitted,

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TABLE OF CONTENTS

Question presented i

Motion for leave to file iii

Interest of *amicus curiae* iv

Table of authorities v

Brief *amicus curiae* 1

Summary of facts and case 1

Summary of argument 2

Argument 4

I

State criminal procedures that conform with traditional practices are due great deference under the Due Process Clause 4

A. Tradition of deference 4

B. *Medina* v. *California* 6

II

Neither instruction abrogates any traditional right, and neither is fundamentally unfair 10

A. History 10

B. Contemporary practice 16

C. Fundamental fairness 17

III

Cage v. *Louisiana* does not render either instruction fundamentally unfair 18

IV

This Court should not stifle experimentation in this difficult area 22

A. Limited alternatives 22

B. The slippery slope 27

Conclusion 30

TABLE OF AUTHORITIES

Cases

Anderson v. Dunn, 6 Wheat. (19 U. S.) 204, 5 L. Ed. 242 (1821) 26

Apodaca v. Oregon, 406 U. S. 404, 32 L. Ed. 2d 184, 92 S. Ct. 1628 (1972) 10, 16

Arizona v. Roberson, 486 U. S. 675, 100 L. Ed. 2d 704, 108 S. Ct. 2093 (1988) 28

Arnold v. State, 23 Ind. 170 (1864) 13

Billard v. State, 30 Tex. 368 (1867) 11

Boyde v. California, 494 U. S. 370, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990) 20

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397 (1953) 15, 24

Brown v. Mississippi, 297 U. S. 278, 80 L. Ed. 682, 56 S. Ct. 461 (1936) 9

Cage v. Louisiana, 498 U. S. 39, 112 L. Ed. 2d 339, 111 S. Ct. 328 (1990) 3, 17-20, 22, 27

Caldwell v. Mississippi, 472 U. S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985) 28

California v. Green, 399 U. S. 149, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970) 29

Carter v. Illinois, 329 U. S. 173, 91 L. Ed. 172, 67 S. Ct. 216 (1946) 4

Coffin v. United States, 156 U. S. 432, 39 L. Ed. 481, 15 S. Ct. 394 (1895) 11, 14

Commonwealth v. Beldotti, 567 N. E. 2d 1219 (Mass. 1991) 16

Commonwealth v. Stokes, 615 A. 2d 704 (Penn. 1992) 16

Commonwealth v. Webster, 5 Cush. (59 Mass.) 295 (1850) 10

Daubert v. Merrell Dow Pharmaceuticals, Inc., 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993) 25

Donnelly v. State, 2 Dutch. (26 N. J.) 601 (1857) 11

Dowling v. United States, 493 U. S. 342, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990) 6, 17

Duckworth v. Eagan, 492 U. S. 195, 106 L. Ed. 2d 166, 109 S. Ct. 2875 (1989) 25, 26

Dunbar v. United States, 156 U. S. 185, 39 L. Ed. 390, 15 S. Ct. 325 (1895) 23

Duncan v. Louisiana, 391 U. S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968) 5, 14

Dutton v. Evans, 400 U. S. 74, 27 L. Ed. 2d 213, 91 S. Ct. 210 (1970) 29

Edwards v. Arizona, 451 U. S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981), ... 28

Estelle v. McGuire, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991) 19

Frye v. United States, 293 F. 1013 (D. C. App. 1923) . 25

Furman v. Georgia, 408 U. S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) 23, 27

Garcia v. San Antonio Metropolitan Transit Authority, 469 U. S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985) 27

Gaskins v. McKellar, 114 L. Ed. 2d 728, 111 S. Ct. 2277 (1991) 22

Gregg v. Georgia, 428 U. S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976) 28

Holland v. United States, 209 F. 2d 516 (CA 10 1954) 17, 21

Holland v. United States, 348 U. S. 121, 99 L. Ed. 150, 75 S. Ct. 127 (1954) 17, 24

Hopt v. Utah, 120 U. S. 430, 30 L. Ed. 708, 7 S. Ct. 614 (1887) 12, 13, 20, 21, 23, 24

Hurtado v. California, 110 U. S. 516, 28 L. Ed. 232, 4 S. Ct. 111 (1884) 4, 5

In re Winship, 397 U. S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) 7, 14, 17, 26

James v. State, 45 Miss. 572 (1871) 11

Johnson v. Louisiana, 406 U. S. 356, 32 L. Ed. 2d 152, 92 S. Ct. 1620 (1972) 9, 21

Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377 (1881) 26

Leland v. Oregon, 343 U. S. 790, 96 L. Ed. 1302, 72 S. Ct. 1002 (1952) 6

Lockett v. Ohio, 438 U. S. 586, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978), ... 28

Malloy v. Hogan, 378 U. S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964) 5

Mapp v. Ohio, 367 U. S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961) 15

Martin v. Ohio, 480 U. S. 228, 94 L. Ed. 2d 267, 107 S. Ct. 1098 (1987) 17

Mathews v. Eldridge, 424 U. S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976) 6, 7

McCleskey v. Kemp, 481 U. S. 279, 95 L. Ed. 2d 262, 107 S. Ct. 1756 (1987) 28

Medina v. California, 120 L. Ed. 2d 353,
112 S. Ct. 2572 (1992) 2, 6-9, 14, 16

Miles v. United States, 103 U. S. 304,
26 L. Ed. 481 (1881) 11, 12, 13, 23

Mills v. Maryland, 486 U. S. 367, 100 L. Ed. 2d 384,
108 S. Ct. 1860 (1988) 28

Minnick v. Mississippi, 112 L. Ed. 2d 489,
111 S. Ct. 486 (1990) 28

Miranda v. Arizona, 384 U. S. 436, 16 L. Ed. 2d 694,
86 S. Ct. 1602 (1966) 25, 28

Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791,
55 S. Ct. 340 (1935) 9

Moore v. Dempsey, 261 U. S. 86, 67 L. Ed. 543,
43 S. Ct. 265 (1923) 9

New State Ice Co. v. Liebmann, 285 U. S. 262,
76 L. Ed. 747, 52 S. Ct. 371 (1932) 27

Patterson v. New York, 432 U. S. 197, 53 L. Ed. 2d 281,
97 S. Ct. 2319 (1977) 4, 6, 7, 8, 14

Payne v. Tennessee, 115 L. Ed. 2d 720,
111 S. Ct. 2597 (1991) 4

People v. Brigham, 25 Cal. 3d 283,
599 P. 2d 100 (1979) 16, 24

People v. Sandoval, 4 Cal. 4th 155,
841 P. 2d 862 (1992) 1, 2

People v. Strong, 30 Cal. 151 (1866) 11

Perovich v. United States, 205 U. S. 86, 51 L. Ed. 722,
27 S. Ct. 456 (1907) 12

Planned Parenthood of SE Pa. v. Casey,
120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992) 15

Rose v. Lundy, 455 U. S. 509, 71 L. Ed. 2d 379,
102 S. Ct. 1198 (1982) 9

Skipper v. South Carolina, 476 U. S. 1, 90 L. Ed. 2d 1,
106 S. Ct. 1669 (1986) 28

Smith v. State, 588 So. 2d 561
(Ala. Crim. App. 1991) 16, 17

Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674,
54 S. Ct. 330 (1934) 5, 9

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78 S. Ct. 1332 (1958) 7, 15

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALFRED ARTHUR SANDOVAL, *Petitioner*,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*,

---- AND ----

CLARENCE VICTOR, *Petitioner*,

vs.

THE PEOPLE OF THE STATE OF NEBRASKA, *Respondent*.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

SUMMARY OF FACTS AND CASE

Petitioner Sandoval in No. 92-9049 was convicted on four counts of first degree murder with a multiple-murder special circumstance finding. See *People* v. *Sandoval*, 4 Cal. 4th 155, 167-168, 841 P. 2d 862, 866 (1992). The jury returned a verdict of death for one killing and verdicts of life without possibility of parole for the three other murders. *Id.*, at 168, 841 P. 2d, at 866. The jury was given an instruction substantially similar to the standard jury instruction on reasonable doubt, CALJIC 2.90.[1] See

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1. See Appendix for the text of CALJIC 2.90.

Opp., at 5, n. 2. The California Supreme Court affirmed Sandoval's convictions and sentence. See *id.*, at 198, 841 P. 2d, at 886.

Petitioner Victor in No. 92-8894 was convicted of first degree murder and use of a weapon to commit a felony for killing 82-year-old Alice Singleton. He was sentenced to death for the murder. *State* v. *Victor*, 494 N. W. 2d 565, 568 (Neb. 1993). His jury was given essentially the same reasonable doubt instruction that was approved by the Nebraska Supreme Court in *State* v. *Morley*, 474 N. W. 2d 660 (Neb. 1991).[2] *Victor*, *supra*, 494 N. W. 2d, at 569. Relying on *Morley*, the Nebraska Supreme Court rejected Victor's challenge to the reasonable doubt instruction. *Ibid*.

SUMMARY OF ARGUMENT

Because due process arguments have great potential for needless interference in state criminal procedure, this Court has been very reluctant to expand the guarantee. Instead, this Court has traditionally deferred to the state's primacy in criminal law.

This deference was reaffirmed in *Medina* v. *California*, 120 L. Ed. 2d 353, 112 S. Ct. 2572 (1992). *Medina* established that a procedure that is not contrary to established practice will not violate due process unless it is fundamentally unfair. As few practices are so egregious as to be fundamentally unfair, the vast majority will not violate the Due Process Clause.

The California and Nebraska reasonable doubt instructions are sanctioned by history and are not fundamentally unfair. The California instruction is taken from the landmark case in the modern definition of reasonable doubt. This definition of reasonable doubt has been

2. See Appendix for the text of the *Morley* instruction.

consistently popular with the states and has been approved by this Court. The Nebraska instruction is composed of similarly acceptable parts. Voiding these traditional instructions would be a particularly excessive expansion of due process.

Recent treatment of the instructions supports their constitutionality. They are still popular in several states, and the criticism of them has been primarily of a practical, not constitutional, nature.

Nor are these instructions fundamentally unfair. These long-respected procedures are not the egregious practices that fundamental fairness protects against. They are the good faith efforts of two states to define reasonable doubt. Due process requires no more.

Cage v. *Louisiana*, 498 U. S. 39 (1990) *(per curiam)* does not change the analysis. Neither instruction contains any reference to "grave uncertainty," the phrase that was key to the *Cage* decision. While the California and Nebraska instructions do contain language that was criticized in *Cage*, this language was used in a different context than what was condemned in *Cage*. Finally, the standard of review for jury instructions employed by *Cage* has been subsequently rejected by this Court.

This Court should be particularly hesitant to interfere with a state's definition of reasonable doubt. If this Court strikes down the two instructions before it, then there will be a great demand for this Court to supply an approved definition of reasonable doubt. Unfortunately, no clearly superior alternative standard exists. This Court should therefore avoid announcing a standard, because it would stifle innovation and prevent the states from developing the best standard. Finally, undue interference with state reasonable doubt instructions is too close to constitutionalizing the law of evidence, a development this Court must avoid.

ARGUMENT

I. State criminal procedures that conform with traditional practices are due great deference under the Due Process Clause.

A. Tradition of Deference.

"Due process" is a potentially loaded term. Because it does not state what specific processes are due, it could be misinterpreted to burden the states with virtually any procedure. Such pervasive federal control of criminal procedure violates a basic principle of federalism, that preventing and dealing with crime is primarily a state matter. See *Patterson* v. *New York*, 432 U. S. 197, 201 (1977).

Thus, "the Due Process Clause has never been perverted so as to force upon the . . . States a uniform code of criminal procedure." *Carter* v. *Illinois*, 329 U. S. 173, 175 (1946). Instead, "[u]nder our constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for commission of these crimes, and establishing procedures for criminal trials rests with the States." *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 734, 111 S. Ct. 2597, 2607 (1991).

This still leaves the problem of how to protect state criminal procedure from unduly expansive interpretations of the Due Process Clause. One way to limit the reach of due process would be to judge state procedures against the common law. The advantage of using the common law is that what process was due is relatively well known, thus limiting the reach of the clause. Unfortunately, this is too restrictive on the states. Preventing the states from departing from the common law would stifle criminal procedure, preventing much of the experimentation that is so vital to federalism. Thus *Hurtado* v. *California*, 110 U. S. 516 (1884) allowed California to use a preliminary hearing instead of the common law indictment because states must be given the freedom to develop their own

procedures. The Due Process Clause of the Fourteenth Amendment

> "refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and *the greatest security for which resides in the right of the people to make their own laws*, and alter them at their pleasure." *Id.*, at 535 (emphasis added).

At the heart of this argument is the idea that this Court cannot impose a particular procedure upon the states simply because it believes that its procedure is better. A state procedure "does not run foul of the Fourteenth Amendment because another method may seem to [this Court's] thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934). Instead, a state "is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in doing so it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as *fundamental*." *Ibid.* (emphasis added).

The incorporation doctrine has narrowed the scope of *Snyder*. Its statements about self-incrimination and jury trial, see *ibid.*, are no longer true. See *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964); *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968). But incorporation, if anything, strengthens the case for limiting the scope of procedural due process. The incorporation of most of the Bill of Rights gives state defendants many specific protections. As the Bill of Rights has become more and more like a national code of criminal procedure, see Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 155-156 (1970), there is even less need for expansive interpretations of the Due Process Clause. See

Dowling v. *United States*, 493 U. S. 342, 352 (1990). A corollary to this development is that modern claims under due process are less likely to invoke specific rights, but instead rely on much more ephemeral claims of general unfairness. Thus this Court today has even less reason for expanding due process.

Justice Harlan affirmed this development in his opinion for this Court in *Spencer* v. *Texas*, 385 U. S. 554 (1967). "In the procedures before us, in contrast, no specific federal right . . . is involved; reliance is placed solely on a general 'fairness' approach. In this area the Court has always moved with caution before striking down state procedures." *Id.*, at 565. Instead of adopting its own code of fairness, this Court has instead deferred to state judgments, choosing to limit its discretion under the Due Process Clause. See *Leland* v. *Oregon*, 343 U. S. 790, 799 (1952).

B. Medina v. California.

The tradition of deference to state criminal procedure was reaffirmed in *Medina* v. *California*, 120 L. Ed. 2d 353, 112 S. Ct. 2572 (1992). The *Medina* Court rejected the balancing test that had been developed for administrative law in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976) and adopted the traditional deference to state criminal procedure enunciated in *Patterson* v. *New York*, 432 U. S. 197 (1977). *Medina*, *supra*, 120 L. Ed. 2d, at 361, 112 S. Ct., at 2576-2577.

The *Patterson* Court had rejected a due process challenge to New York's placement of the burden of proof of the affirmative defense of extreme emotional disturbance on defendant. This decision was bottomed on the tradition of deference to state courts in criminal matters. See *Patterson*, *supra*, 424 U. S., at 201. Given its decision not to interfere with the state procedure "unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked

as fundamental,' " *id.*, at 202 (quoting *Speiser* v. *Randall*, 357 U. S. 513, 523 (1958)), the *Patterson* Court had to find some substitute for a simple balancing of interests. Deference to historically accepted procedures achieved the twin goals of placing a limit on any open-ended guarantees of fairness while at the same time preserving those rights that are worthy of being called fundamental.

Thus, it was important to the *Patterson* Court that New York's severe emotional disturbance defense was simply "an expanded version of the common-law defense of heat of passion on sudden provocation . . . ." *Id.*, at 202. The burden of proving this and other affirmative defenses was traditionally on the defendant, both at the common law and when the Fifth and Fourteenth Amendments were passed. *Id.*, at 202. History was thus able to define the limits of the aphorism "that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U. S. 358, 372 (1970) (Harlan, J., concurring). "Proof of the non-existence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case . . . ." 432 U. S., at 210.

Medina reaffirms this tradition of deference to established practices. "[B]ecause the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area." *Medina*, *supra*, 120 L. Ed. 2d, at 363, 112 S. Ct., at 2577. This approach, approved in *Patterson*, "is thus far less intrusive than that approved in *Mathews*," *ibid.*, which involved balancing the individual's against the government's interests in the challenged procedure. See *Mathews*, *supra*, 424 U. S., at 335.

The *Medina* Court's decision to adopt the narrower interpretation of the Due Process Clause hinged upon the incorporation doctrine.

> "The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Medina*, *supra*, 120 L. Ed. 2d, at 362, 112 S. Ct., at 2576.

The *Medina* Court first limited the scope of the Due Process Clause by looking to the historical basis of the proposed constitutional rule. If a rule is " 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' " *id.*, at 363, 112 S. Ct., at 2577 (quoting *Patterson*, *supra*, 432 U. S., at 202), then it should be part of a long and commonly accepted practice and thus protected under due process. Where the constitutional rule proposed by defendant is not part of a settled tradition, then the challenged state practice is on a much stronger footing. See 120 L. Ed. 2d, at 364, 112 S. Ct., at 2578. A state procedure's worthiness could be further enhanced by looking to current practice. While "of limited relevance to due process inquiry," if the constitutional rule proposed by defendant does not have at least substantial contemporary acceptance there is little reason to believe that the proposed rule is fundamental. *Ibid.*

If the challenge to the state procedure has no basis in history, then the only alternative is an appeal to fundamental fairness. The *Medina* Court recognizes that a historically valid practice may nonetheless be unconstitutional if it "transgresses any recognized principle of 'fundamental fairness' in operation." *Id.*, at 365, 112 S. Ct., at 2578. This Court did not need to explain exactly what constituted a fundamentally unfair procedure because of the weakness of Medina's claim.

Medina claimed that it violated due process for California to place on defendant the burden of proof that

he is incompetent to stand trial. *Id.*, at 359, 112 S. Ct., at 2574. As allocating the burden neither required defendant to disprove any elements of the crime nor rewarded the government for any impropriety, "it [was] not difficult to dispose of petitioner's challenge to the presumption of competence . . . ." *Id.*, at 367, 112 S. Ct., at 2581. Therefore, the *Medina* Court did not have to explore the parameters of fundamental fairness.

Given the deference due to state procedures under the Due Process Clause, a rule guaranteeing fundamental fairness must be narrow. "[F]airness is a relative, not an absolute concept." *Snyder* v. *Massachusetts*, 291 U. S. 97, 116 (1934). Therefore, "what is fair in one set of circumstances may be an act of tyranny in others." *Id.*, at 117. Any standard that is as potentially subjective as fairness must be narrowly construed in order to avoid swallowing up the traditional deference to state criminal procedure.

Mere disagreement with a state procedure is not enough to render it fundamentally unfair. See *Johnson* v. *Louisiana*, 406 U. S. 356, 362 (1972). The definition of fundamental fairness

> "is best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods." *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (Stevens, J., dissenting) (footnotes omitted).

These cases deal with procedures or trials that undermine the basic integrity of the trial. The three cases cited in the *Lundy* dissent—*Moore* v. *Dempsey*, 261 U. S. 86 (1923); *Mooney* v. *Holohan*, 294 U. S. 103 (1935); and *Brown* v. *Mississippi*, 297 U. S. 278 (1936)—represent the worst types of abuses found in the history of American criminal procedure and are mercifully rare.

If a procedure does not violate a specific federal right, is not contrary to a traditional right, and does not critically undermine the trial, then it does not violate due process. The incorporated Bill of Rights and the many protections provided by state law provide state defendants with enough protection that it is unnecessary to turn due process into a code of criminal procedure.

II. Neither instruction abrogates any traditional right, and neither is fundamentally unfair.

A. History.

The strongest argument in favor of the constitutionality of the California and Nebraska instructions is their history. The California instruction, CALJIC 2.90, is taken from one of the landmark cases in American criminal law, *Commonwealth* v. *Webster*, 5 Cush. (59 Mass.) 295, 320 (1850). See 5 B. Witkin and N. Epstein, California Criminal Law § 2652, at 3184 (2d ed. 1989). *Webster* began the application of reasonable doubt "in its modern form in criminal cases." *Apodaca* v. *Oregon*, 406 U. S. 404, 412, n. 6 (1972) (plurality). An attack on CALJIC 2.90 is thus an attack on the foundation of modern reasonable doubt law.

Petitioner Sandoval attempts to distinguish the California instruction from that given in *Webster*. He notes that the instruction read in *Webster* contains additional language on the burden of proof and the need to prove each fact beyond a reasonable doubt. See Petitioner's Brief, at 38-39. This no more than faint praise in light of the assault petitioner makes on the rest of *Webster*. Sandoval asserts that the California "instruction consists of a passage extracted from *Commonwealth* v. *Webster*, each component of which conveys an improper meaning to the jury in current parlance. While the passage—at the time it was penned—conveyed a meaning consistent with the core concept of proof beyond a reasonable doubt, the

meaning presently conveyed is a *gross deviation* from that core concept." *Id.*, at 37 (emphasis added).

This is a dagger thrust at the heart of the *Webster* instruction. No amount of further instruction could save a "gross deviation" from the definition of reasonable doubt. The passage from *Webster* that was adopted by California was, and still is, considered to be the heart of the *Webster* definition of reasonable doubt. See F. Wharton, Wharton's Criminal Evidence § 1, at 2-3 (9th ed. 1884); J. Strong, McCormick on Evidence § 341, at 577 (4th ed. 1992). Sandoval's attack on CALJIC 2.90 is an attack on *Webster*.

The reasonable doubt standard is derived from the presumption of innocence, a principle with roots reaching at least as far back as Roman law, and possibly back to the Old Testament. See *Coffin* v. *United States*, 156 U. S. 432, 453-454 (1895). Reasonable doubt is of much more recent vintage. The earliest use of reasonable doubt is believed to be a 1798 high treason case tried in Dublin. See *Apodaca*, *supra*, 406 U. S., at 412, n. 6. There was a fair amount of confusion over when and how to apply the reasonable doubt standard until the *Webster* decision ushered in the modern age. See *ibid.*

Webster was recognized as the leading definition of reasonable doubt during the period after the ratification of the Fourteenth Amendment. The treatise writers of the day saw *Webster* as the authoritative definition of reasonable doubt. See Wharton's, *supra*, § 1, at 2-3; H. Kelley, Criminal Law and Practice § 374, at 199 (1876). Many states also adopted *Webster*. See, *e.g.*, *Williams* v. *State*, 52 Ala. 411, 413 (1875); *Donnelly* v. *State*, 2 Dutch. (26 N. J.) 601, 615 (1857); *State* v. *Ostrander*, 18 Iowa 435, 459 (1865); *James* v. *State*, 45 Miss. 572, 575 (1871); *Billard* v. *State*, 30 Tex. 368, 373 (1867); *People* v. *Strong*, 30 Cal. 151, 155 (1866).

This Court has also accepted the *Webster* definition of reasonable doubt. In *Miles* v. *United States*, 103 U. S. 304

(1881) the trial court instructed the jury that " '[p]roof beyond a reasonable doubt' is such as will produce an abiding conviction in the mind to a *moral certainty* that the fact exists that is claimed to exist, so that you feel certain that it exists." *Id.*, at 309 (emphasis added). While the *Miles* Court felt that most attempts to define reasonable doubt were futile, see *id.*, at 312, it upheld this "moral certainty" definition. "The language used in this case, however, was certainly *very favorable to the accused*, and is sustained by *respectable authority*. *Commonwealth* v. *Webster*, 5 Cush. (Mass.) 295 . . . ." *Ibid.* (emphasis added); accord *Wilson* v. *United States*, 232 U. S. 563, 570 (1914).

Webster was also endorsed in *Perovich* v. *United States*, 205 U. S. 86 (1907). There, "this instruction [on reasonable doubt] is taken from the charge of Chief Justice Shaw to the jury in *Commonwealth* v. *Webster*, 5 Cush. 295, 320 . . . ." 205 U. S., at 92. This Court upheld the instruction, relying on the prior approval of *Webster* in *Miles*. See *ibid.*

The other early decision that addressed the *Webster* definition was *Hopt* v. *Utah*, 120 U. S. 430 (1887). The instruction at issue did not define reasonable doubt in terms of moral certainty, see *id.*, at 439, but the Court nonetheless noted the *Webster* definition of reasonable doubt, feeling that " 'to a reasonable and moral certainty' add[s] nothing to the words 'beyond a reasonable doubt' . . . ." *Id.*, at 440. The *Hopt* Court felt that in all but the more complicated cases, the best instruction may be to leave reasonable doubt undefined. *Id.*, at 440-441.

Given the approval of *Webster* in *Miles* and the subsequent support of *Miles* in *Perovich* and *Wilson*, this mildly critical dicta is not damning. Furthermore, *Webster* was not being criticized for restricting defendant's rights. The *Hopt* Court instead felt that *Webster* was not up to the task of keeping jurors from arriving at unsupported acquittals.

> "Out of the domain of the exact sciences and actual observation there is no absolute certainty. The guilt of the accused, in the majority of criminal cases, must necessarily be deduced from a variety of circumstances leading to proof of the fact. Persons of speculative minds may in almost every such case suggest possibilities of the truth being different from that established by the most convincing proof. The jurors are not to be led away by speculative notions as to such possibilities." *Id.*, at 439-440.

The Nebraska definition of reasonable doubt uses moral certainty language similar to that found in *Webster* and also defines it as "such a doubt as would cause a reasonable and prudent man, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon." *State* v. *Morley*, 474 N. W. 2d 660, 669 (Neb. 1991). While not found in *Webster*, this phrase has a similarly strong background.

This analogy to "important transactions" had its own adherents in 19th century state courts, see, *e.g.*, *Arnold* v. *State*, 23 Ind. 170 (1864); *State* v. *Oscar*, 7 Jones (52 N. C.) 305 (1860), and received strong support from this Court. In *Miles*, *supra*, the trial court, in addition to using moral certainty language from *Webster*, further defined reasonable doubt as the level of belief so " 'that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests.' " 103 U. S., at 309. This language was also approved by the *Miles* Court. See *id.*, at 312.

The *Hopt* Court gave even more explicit approval of this type of instruction. It noted that "an illustration like the one given in this case, by reference to the conviction upon which the jurors would act in the weighty and important concerns of life, would be likely to aid them to a right conclusion . . . ." *Hopt*, *supra*, 120 U. S., at 441.

Using the term "substantial" to help define reasonable doubt, while not as popular as the two definitions discussed above, was not contrary to the roots of reasonable doubt. In *Coffin* v. *United States*, 156 U. S. 432, 453 (1895) the trial court instructed the jury that "[a] reasonable doubt, as that term is employed in the administration of the criminal law, is an honest, *substantial* misgiving, generated by the proof or want of it." (emphasis added). This, and the rest of the reasonable doubt instruction, was held to be a complete instruction on reasonable doubt.[3] *Ibid*. If this term were fundamentally unfair, this Court would have invalidated the instruction in *Coffin*.

"Historical practice is probative of whether a procedural rule can be characterized as fundamental." *Medina* v. *California*, 120 L. Ed. 2d 353, 363, 112 S. Ct. 2572, 2577 (1992); see *Patterson* v. *New York*, 432 U. S. 197, 202 (1977); *In re Winship*, 397 U. S. 358, 361 (1970). The *Medina*, *Patterson*, and *Winship* Courts were using history to see if historical practice justified resorting to due process to impose a particular rule upon the states. "Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does 'reflect a profound judgment about the way in which law should be enforced and justice administered.' " *Winship*, *supra*, 397 U. S., at 361-362 (quoting *Duncan* v. *Louisiana*, 391 U. S. 145, 155 (1968)).

Petitioners do not advance such a rule. Instead, the weight of history supports the language found in the California and Nebraska instructions. In *Medina*, the fact that it was unsettled whether history supported defendant's claim was enough to keep this Court from invoking due process to impose a new procedural burden on the state. See *Medina*, *supra*, 120 L. Ed. 2d, at 364, 112

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3. The *Coffin* Court reversed the conviction because there was no additional instruction on the presumption of innocence. See *id*., at 461.

S. Ct., at 2578. Here, where history favors the states' positions, the argument against extending due process is all the stronger.

The argument against extending due process is made conclusive by this Court's treatment of the language used in the two instructions. Once this Court approves a practice, other jurisdictions that employ the same or similar practice should be able to rely on this Court's approval. While not infallible, this Court is final, see *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring), and state courts and legislatures have every reason to continue a practice that this Court has approved and has never overturned. Ignoring precedent and dashing these expectations can only diminish respect for the rule of law that is at the heart of *stare decisis*. See *Vasquez* v. *Hillery*, 474 U. S. 254, 265-266 (1986); *Planned Parenthood of SE Pa.* v. *Casey*, 120 L. Ed. 2d 674, 700, 112 S. Ct. 2791, 2808 (1992). Ignoring the approval found in *Miles*, *Wilson*, *Perovich*, and *Hopt* will diminish the rule of law.

This Court has usually confined upsetting state expectations in criminal procedure to extending the Bill of Rights to the states. There was usually strong historic precedent for such an extension and frequently a new right was imposed only after many states had adopted similar practices. See, *e.g.*, *Mapp* v. *Ohio*, 367 U. S. 643, 651 (1961).

General due process, however, is another matter. Where no specific federal right is asserted, "the Court has always moved with caution before striking down state procedures." *Spencer* v. *Texas*, 385 U. S. 554, 565 (1967). As due process is so open-ended, this Court must be particularly careful not to upset state expectations. Therefore, this Court should not undo what it has already done.

B. Contemporary Practice.

"Contemporary practice, while of limited relevance to the due process inquiry," *Medina* v. *California*, 120 L. Ed. 2d 353, 364, 112 S. Ct. 2572, 2578 (1992), also favors the two instructions. "Moral certainty" is still accepted as a valid term for defining reasonable doubt by other jurisdictions. See, *e.g.*, *Smith* v. *State*, 588 So. 2d 561, 569 (Ala. Crim. App. 1991); *Commonwealth* v. *Beldotti*, 567 N. E. 2d 1219, 1225 (Mass. 1991); *State* v. *Williams*, 828 P. 2d 1006, 1018 (Or. 1992); *State* v. *Rhodes*, 822 P. 2d 960, 978 (Idaho 1991). While there has been minor constitutional criticism of "moral certainty," see *State* v. *Montgomery*, 417 S. E. 2d 742, 750 (N. C. 1992), the primary criticism of *Webster* is not that it *unconstitutionally* deprives defendant of a reasonable doubt instruction, but that it does not help to clarify what reasonable doubt means. See J. Strong, McCormick on Evidence § 341, at 577 (4th ed. 1992).

Even the most eloquent critic of California's reasonable doubt instruction did not assail it in constitutional terms. In *People* v. *Brigham*, 25 Cal. 3d 283, 599 P. 2d 100 (1979) Justice Stanley Mosk, while criticizing CALJIC No. 2.90 and Penal Code section 1096 extensively, concurred in the affirmance of a conviction where this instruction was used. Instead of dissenting on the ground that the reasonable doubt instruction was unconstitutional, he simply called upon the legislature to provide a superior solution to the problem of reasonable doubt. See *id.*, at 314, 599 P. 2d, at 120 (Mosk, J., concurring). Furthermore, this Court's last reference to *Webster* was favorable, noting that it ushered in the modern age of reasonable doubt. See *Apodaca* v. *Oregon*, 406 U. S. 404, 412, n. 6 (1972). "Moral certainty" is not a standard under sustained constitutional assault.

Nor have the states necessarily seen the word "substantial" as poisonous. In *Commonwealth* v. *Stokes*, 615 A. 2d 704, 709-710 (Penn. 1992) the Pennsylvania

Supreme Court refused to invalidate a reasonable doubt instruction just because it used the word "substantial" to differentiate reasonable doubt from imagined doubt or passing fancy. See also *Smith* v. *State*, 588 So. 2d 561, 569 (Ala. Crim. App. 1991). In *Holland* v. *United States*, 348 U. S. 121, 140 (1954) this Court affirmed an instruction that stated that a reasonable doubt was a " 'substantial doubt, not a trivial doubt . . . .' " *Holland* v. *United States*, 209 F. 2d 516, 522 (CA 10 1954). While "substantial doubt" must now be used with care, see *Cage* v. *Louisiana*, 498 U. S. 39 (1990),[4] it has not required automatic reversal.

In any event, neither instruction is against the overwhelming weight of authority. Even if the bulk of authority was against them, that would not be enough to make them unconstitutional. See *Martin* v. *Ohio*, 480 U. S. 228, 235-236 (1987). Substantial approval, however, should significantly weigh in favor of the challenged state procedure. Due process only protects rules of fundamental fairness and it is difficult to see how a practice is fundamentally unfair if it has strong historic roots and continues to be observed in several jurisdictions.

C. Fundamental Fairness

The Due Process Clause's guarantee of fundamental fairness is not an invitation for federal courts to meddle in state criminal procedure. This guarantee only protects the accused from the very worst practices. See Part I B, *ante*, at 6-10. The main source of federal protection is now the Bill of Rights. See *Dowling* v. *United States*, 493 U. S. 342, 352 (1990).

Reasonable doubt is fundamental to the fairness of the criminal trial. See *In re Winship*, 397 U. S. 358, 362-363 (1970). This requirement has roots deep in our constitutional history. See *id.*, at 362. The California and

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4. *Cage* will be addressed in Part III of this brief.

Nebraska instructions are an important part of this history. They have roots that stretch back to the first modern definition of reasonable doubt and have been widely used ever since. See Part II, *ante*, at 10-18. It would be a needless irony to strike down the roots of a requirement steeped in history.

Both instructions tell the jury that they cannot convict if they have a reasonable doubt. Neither definition of reasonable doubt negates this basic requirement. See Part III, *post*, at 18-22. Fundamental fairness can require no more. "In the face of the legitimate state purpose and the long-standing and widespread use that attend the procedure under attack here, [this Court should] find it impossible" to declare these instructions fundamentally unfair. *Spencer* v. *Texas*, 385 U. S. 554, 564 (1967).

III. *Cage* v. *Louisiana* does not render either instruction fundamentally unfair.

This Court's uninterrupted support for the language found in the California and Nebraska reasonable doubt instructions appeared to change in *Cage* v. *Louisiana*, 498 U. S. 39 (1990) *(per curiam)*. *Cage*'s criticism of Louisiana's use of "moral certainty" and "substantial doubt" does not, however, change the mandate of history. These historically sanctioned instructions are not rendered invalid by this brief *per curiam* opinion. Careful analysis of the instruction struck down by *Cage*, this Court's subsequent treatment of that decision, and totality of the California and Nebraska instructions show that neither instruction is diminished by *Cage*.

Any analysis of *Cage* and its impact must begin with the instruction it struck down. The pertinent part read:

> " 'This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*.' " *Id.*, at 40 (emphasis in original).

While three phrases struck the eye of the *Cage* Court, the first was by far the most serious. "Grave" is "1. [r]equiring serious thought; momentous; *a grave decision in a time of crisis*." American Heritage Dictionary 791 (3d ed. 1992) (emphasis in original). This is fundamentally incompatible with any possible definition of reasonable doubt. In effect, the trial court told the jury that it must convict the capital defendant *unless* it had a momentous doubt.

This gross inaccuracy has the effect of shifting the burden of proof to defendant. For the jury to have a "grave" doubt about defendant's guilt, it must feel that defendant's case was stronger than the prosecution's. This role reversal clearly violates due process.

The *Cage* Court did not stop there. It also stated that "substantial," like "grave," "suggest[ed] a higher degree of doubt than is required for acquittal under the reasonable doubt standard." *Id.*, at 41. This, combined with the reference to moral certainty, made it "clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Ibid.*

This attack on the grossly inadequate instruction in *Cage* cannot be translated into a broader assault on the California and Nebraska instructions. The *Cage* decision uses a standard for analyzing jury instructions that has since been disapproved. In *Estelle* v. *McGuire*, 116 L. Ed. 2d 385, 399, n. 4, 112 S. Ct. 475, 482, n. 4 (1991)

this Court formally disapproved the "reasonable juror" standard employed in *Cage*, recognizing that *Boyde* v. *California*, 494 U. S. 370, 379-380 (1990) made "reasonable likelihood" the single standard for reviewing jury instructions. While the *Boyde* Court doubted that there was much difference between the various standards used to evaluate instructions, see *id.*, at 379, this opinion still places *Cage* in a different light.

It is no longer enough that a reasonable juror *could* have misapplied the reasonable doubt standard; there must now be a stronger, reasonable likelihood. This change embodies the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Boyde*, *supra*, 494 U. S., at 380.

This places the California and Nebraska instructions in a different light. Although Nebraska refers to "substantial doubt," it does so in a much different context. The Louisiana instruction bluntly asserted that "A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.*" *Cage*, *supra*, 498 U. S., at 40 (emphasis in original). Nebraska, however, takes a much more nuanced approach.

> "A reasonable doubt is an actual and substantial doubt *reasonably arising from the evidence*, from the facts and circumstances shown by the evidence, or from the lack of evidence on the part of the State, *as distinguished from a doubt arising from mere possibility*, from bare imagination, or from fanciful conjecture." *Morley*, *supra*, 474 N. W. 2d, at 670 (emphasis added).

This is a different use of the term "substantial." The *Cage* instruction was using substantial to mean "[a]mple; sustaining . . . ." American Heritage Dictionary 1791 (3d ed. 1992). Nebraska, however, is using "substantial" to mean "[t]rue or real; not imaginary." *Ibid*. Because there is some doubt inherent in all human affairs, there is a risk that juries will use this inherent doubt as the foundation for unwarranted acquittals. See *Hopt* v. *Utah*, 120 U. S. 430, 439-440 (1887). By defining "substantial" as not "mere possibility, . . . bare imagination, or . . . fanciful conjecture" the Nebraska instruction advances the important goal of minimizing the risk of jury error.

The validity of Nebraska's instruction is further enhanced by the inclusion of the "graver and more important transactions of life" language. This type of instruction has been consistently approved as one of the best ways of defining reasonable doubt. See, *e.g.*, *id.*, at 441; *Holland* v. *United States*, 348 U. S. 121, 140 (1954). Taken as a whole, Nebraska more than adequately instructs its juries on reasonable doubt.

The use of "moral certainty" does not render either the California or the Nebraska instruction unconstitutional. This old and well-respected term was criticized in *Cage* because it was combined with the grossly improper uses of "grave" and "substantial." As California uses neither of these terms and Nebraska's use of "substantial" is proper within its context, "moral certainty" does not poison either instruction. It is a term "that has received frequent sanction and has been quoted innumerable times . . . ." 9 J. Wigmore, Evidence § 2497, at 405 (Chadbourn rev. 1981). The brief, partially overruled *Cage per curiam* should not be allowed to strike down this long-accepted instruction.

"Moral certainty" may not be this Court's ideal of a proper reasonable doubt instruction, but this Court does not review the wisdom of a state's practice. See *Johnson* v. *Louisiana*, 406 U. S. 356, 362 (1972). It is looking for that rarest of practices, a fundamentally unfair procedure. Unlike "grave doubt," moral certainty does not tell the jury to use a standard different from reasonable doubt. Instead, the *Webster* instruction used by California refers to simple "reasonable doubt" and requires the jury to have "an abiding conviction" of defendant's guilt. See Opp., at 5, n. 2.

Furthermore, the California instruction places moral certainty in a different context than the instruction in *Cage*. The California instruction states "[i]t is that state of the case which after the *entire comparison and consideration of all the evidence* leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." *Ibid*. (emphasis added). The *Cage* Court was concerned that the instruction before it would keep the jury from basing its verdict on "evidentiary certainty." *Cage*, *supra*, 498 U. S., at 41. California's instruction, however, explicitly requires the jury to consider all the evidence before reaching its verdict.

The key to the *Cage* opinion is the "grave uncertainty" language. As Justice Stevens has noted, an instruction that does not contain the "grave uncertainty" language condemned by *Cage* does not raise the question of whether *Cage* was violated. See *Gaskins* v. *McKellar*, 114 L. Ed. 2d 728, 111 S. Ct. 2277 (1991) (Stevens, J., concurring in denial of certiorari). As neither of these instructions have that fatal flaw, *Cage* should not be invoked to void the long-respected practices embodied in the California and Nebraska instructions.

IV. This Court should not stifle experimentation in this difficult area.

A. Limited Alternatives.

Before this Court considers voiding the California and Nebraska instructions, it should consider the problem of coming up with a constitutionally acceptable alternative. Several states use language that is the same or similar to that found in these two instructions, and many states rely on pattern instructions in order to insure an important consistency in the treatment of defendants. This means that disapproval of the instructions in question could leave

many convictions vulnerable, as a key instruction used in every prosecution is suddenly uprooted.

If this Court does not provide the states with guidance on what is an acceptable instruction, confusion is sure to follow. One need only look at the aftermath of *Furman* v. *Georgia*, 408 U. S. 238 (1972), where many states responded to the many *Furman* opinions by eliminating the sentencer's discretion in capital cases, only to have this approach rejected in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976). The reasonable doubt instruction must be given in every criminal case. As failure to give a proper reasonable doubt instruction is never harmless error, see *Sullivan* v. *Louisiana*, 124 L. Ed. 2d 182, 190, 113 S. Ct. 2078, 2082 (1993), this matter is too important to be left undecided.

The problem, however, is that there is no clearly superior definition of reasonable doubt. The problem of defining reasonable doubt has been well-documented and widely lamented. See, *e.g.*, *Miles* v. *United States*, 103 U. S. 304, 312 (1881); *Dunbar* v. *United States*, 156 U. S. 185, 199 (1895); 9 J. Wigmore, Evidence § 2497, at 405 (Chadbourn rev. 1981). This Court should not use the Due Process Clause to try to solve this mystery.

The problem with defining reasonable doubt is that "[o]ut of the domain of the exact sciences and actual observation there is no absolute certainty." *Hopt* v. *Utah*, 120 U. S. 430, 439 (1887). Since trials are far from scientific, the reasonable doubt instruction must prevent the trivial doubt inevitable in human affairs from requiring an acquittal in every case, while at the same time preserving the presumption of innocence.

Perhaps the most popular alternative to the *Webster* definition is one of the many variants of the "important transactions" instruction found in Nebraska. See *State* v. *Morley*, 474 N. W. 2d 660, 669 (1991). This illustration is popular in the federal courts and has been well-received by this Court. See *Hopt*, *supra*, 120 U. S., at 441; *Miles*,

supra, 103 U. S., at 312; *Holland* v. *United States*, 348 U. S. 121, 140 (1954); *United States* v. *Ivic*, 700 F. 2d 51, 68 (CA2 1983).

There is nothing wrong with this type of instruction and any instruction that used this language would help the jury understand its duty. Yet it is not necessarily the best definition. Because it illustrates by way of analogy, it requires jurors to make an extra logical connection that they would not have to make if reasonable doubt were defined directly. While it may be better than any current definition, it is by no means the best possible one. There may be some undiscovered instruction that will even better illustrate the jury's duty to weigh the evidence.

The other popular posture is to leave reasonable doubt undefined. See, *e.g.*, *People* v. *Brigham*, 25 Cal. 3d 283, 314, 599 P. 2d 100, 120 (1979) (Mosk, J., concurring). This approach would upset the many instructions that try to define reasonable doubt. Furthermore, in complicated cases some definition of reasonable doubt may be necessary to guide the jury. See *Hopt* v. *Utah*, 120 U. S. 430, 440 (1887). Adopting a no-definition rule leaves juries in the dark and precludes trial courts from finding better alternatives.

It is unfair to expect perfection, even from this Court. After all, this Court is final, not infallible. See *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring). But when this Court invokes the Constitution to require a state to follow a particular standard, it should impose only the best possible standard.

If this Court says that as a matter of constitutional law the states must define reasonable doubt in a particular way, then the debate and experimentation over the proper reasonable doubt instruction will ossify, and this Court's standard will become the unanimous rule. This will stifle all innovation until this Court decides to return to the issue. Given the great pressures on this Court's resources, it is unlikely that it will soon return to the issue of

defining reasonable doubt. For example, for nearly seventy years the leading case on the key issue of admitting scientific testimony did not come from this Court, but from a federal circuit court, *Frye* v. *United States*, 293 F. 1013 (D. C. App. 1923). Only many years after changes in Rule 702 of the Federal Rules of Evidence did this Court weigh in with its own standard. See *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). Thus, any standard announced in this case is likely to be the sole standard for a very long time.

Even if this Court allows the states to vary from whatever definition of reasonable doubt it announces, innovation is likely to stop. *Miranda* v. *Arizona*, 384 U. S. 436 (1966) shows how the inherent coercive power behind this Court's pronouncement can turn even the most voluntary standards into rigid rules.

When the *Miranda* Court announced the now famous warnings, it did not intend to end the dialogue on what warning would be proper. "The warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by a defendant." *Id.*, at 476 (emphasis added). Yet there has been no flowering of ideas on alternative warnings after *Miranda*.

While some agencies like the FBI do vary their warnings from *Miranda*, see *Duckworth* v. *Eagan*, 492 U. S. 195, 202, n. 4 (1989), for the most part, *Miranda* is the standard. This happens because any state that varies from the *Miranda* standard risks substantial litigation and the prospect of having many convictions reversed for *Miranda* violations. In *Eagan*, the *Miranda* warnings given by the police varied from the original by noting that "*We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.*" *Id.*,

at 198 (emphasis in original). The *Eagan* Court vindicated this minor variance, but it did so on a narrow five-to-four majority, and had to overturn a decision by the Seventh Circuit granting habeas corpus. See *id.*, at 200-201. If such a small deviation from the norm requires that much effort to defend, there is no question why *Miranda* has stopped most innovation.

Reasonable doubt is even more important than the *Miranda* warnings. A reasonable doubt instruction must be given in every criminal trial, see *In re Winship*, 397 U. S. 358, 364 (1970), and failure to give an adequate instruction is never harmless error. See *Sullivan* v. *Louisiana*, 124 L. Ed. 2d 182, 190, 113 S. Ct. 2078, 2082 (1993). Thus, any standard announced in the present case would have to be followed even more closely than the one in *Miranda*.

That would be a real tragedy. The states are the laboratories of the law. They must be given the freedom to experiment so that we can all profit by picking from the best of the diverse approaches adopted by the fifty states. "The science of government . . . . is the science of experiment." *Anderson* v. *Dunn*, 6 Wheat. (19 U. S.) 204, 226 (1821), overruled on other grounds in *Kilbourn* v. *Thompson*, 103 U. S. 168, 199-200 (1881).

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive laws as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting) (footnote omitted); accord *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 546 (1985).

B. The Slippery Slope.

Petitioners' desire to invoke the Due Process Clause to interfere with these two traditionally accepted instructions places this Court at the precipice of a particularly slippery slope. If this Court heeds their wishes, it will come much closer to creating a constitutional code of evidence. That result is a calamity that must be resisted.

There are times when this Court should strike down a reasonable doubt instruction. When one is as egregiously bad as the instruction in *Cage* v. *Louisiana*, 498 U. S. 39 (1990), then reversal is deserved. But the instructions in the present case are of a different type. Whatever their minor imperfections, they do not contain the gross inaccuracies found in the instruction condemned in *Cage*. See Part III, *ante*, at 18-22. A decision condemning the California and Nebraska decisions thus comes much closer to an intrusion into the law of evidence.

This Court's experience with other constitutional evidence issues should keep it from expanding this field. One of the best examples of the problems associated with constitutionalizing evidentiary issues is the current tangled state of death penalty law. What started with a generalized disapproval of the unfettered jury discretion in *Furman* v. *Georgia*, 408 U. S. 238 (1972) has evolved into one of the most complicated areas of American law. Responding to the various circumstances of capital

litigation, this Court now simultaneously requires the states to limit the sentencer's discretion, see *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976) (plurality), while at the same time giving the sentencer the discretion and information necessary to make an individualized determination of the appropriate sentence for each capital defendant. See *Woodson* v. *North Carolina*, 428 U. S. 280, 303-305 (1976) (plurality); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality). At the very least there is "inherent tension between" these two lines, see *McCleskey* v. *Kemp*, 481 U. S. 279, 363 (1987) (Blackmun, J., dissenting), while others would be even less charitably disposed towards the dissonance. See *Walton* v. *Arizona*, 497 U. S. 639, 664 (1990) (Scalia, J., concurring). In any event, they are a fertile source of complexity and unending litigation.

The Eighth Amendment is now drenched in evidentiary issues such as requiring the admission of certain types of evidence, see, *e.g.*, *Skipper* v. *South Carolina*, 476 U. S. 1 (1986), and the instructions given juries, see, *e.g.*, *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985); *Mills* v. *Maryland*, 486 U. S. 367 (1988). While these inquiries may be necessary, there is no doubt that they are very complicated and take up enormous judicial resources.

This Court's experience with *Miranda* v. *Arizona*, 384 U. S. 436 (1966) is similar. *Miranda* should have limited the complexity of the law of confessions. It forbids courts from using the facts of a particular case beyond determining whether the *Miranda* guidelines were followed. *Id.*, at 468-469. Instead, the *Miranda* Court supplied a set of guidelines for the courts and police to follow. *Id.*, at 441-442.

This did not eliminate litigation. *Miranda* has been a steady source of cases for this Court over the years, and the supply has not yet abated. See, *e.g.*, *Edwards* v. *Arizona*, 451 U. S. 477 (1981); *Arizona* v. *Roberson*, 486 U. S. 675 (1988); *Minnick* v. *Mississippi*, 112 L. Ed. 2d 489, 111 S. Ct. 486 (1990); *Stansbury* v. *California*, No. 93-5770 (cert. granted Nov. 1, 1993). Considerable problems have arisen over such issues as the difference between interrogation and spontaneous declaration, adequacy of the waiver, and the adequacy of the warning. See *Withrow* v. *Williams*, 123 L. Ed. 2d 407, 432, 113 S. Ct. 1745, 1763 (1993) (O'Connor, J., dissenting).

Miranda involves just one part of the law of evidence, the privilege against self-incrimination. While the decision itself may be worthwhile, it has come at a high cost of complexity and continued litigation.

The law of evidence is inherently complex. Because it is very fact-intensive and involves an extraordinarily large set of legal principles, evidentiary issues always carry with them the threat of complexity. Thus, while it took Professor LaFave only four volumes to complete his masterwork on search and seizure, see LaFave, Search and Seizure (2d ed. 1987), it took Dean Wigmore nine larger volumes to explain the law of evidence. See Wigmore, Evidence (3d ed. 1940). While not precise, this is a good measure of how dangerous constitutionalizing the law of evidence can be.

Therefore, it comes as no surprise that this Court has taken great pains to avoid using the confrontation clause to constitutionalize the rule against hearsay. See *Dutton* v. *Evans*, 400 U. S. 74, 80 (1970). Instead it has sought to protect the narrower principles of confrontation by focusing on protecting defendant's right to "full and effective cross-examination." *California* v. *Green*, 399 U. S. 149, 158 (1970). This is much less complex and disruptive than "a reappraisal of every exception to the hearsay rule, no matter how long established . . . ." *Dutton*, *supra*, 400 U. S., at 80.

Such deference is even more important in the present case. The death penalty, *Miranda*, and the confrontation clause involved specific protections grounded in the Bill of Rights. The present case involves the much more subjective claim of general unfairness. This Court has

been unwilling to aggressively extend this ephemeral portion of the Due Process Clause and should continue to do so here. See *Spencer* v. *Texas*, 385 U. S. 554, 565 (1967).

CONCLUSION

The decisions of the California Supreme Court and the Nebraska Supreme Court should be affirmed.

December, 1993

Respectfully submitted,

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APPENDIX

California Jury Instructions—Criminal ("CALJIC") No. 2.90 (5th ed. 1988):

> "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.
>
> "Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."

State v. *Morley*, 474 N. W. 2d 660, 669-670 (Neb. 1991):

> " **'Reasonable doubt'** is such a doubt as would cause a reasonable and prudent man, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond reasonable doubt and yet be fully aware that possibly you may be mistaken. The jury may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt

> that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts and circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture."

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1993

ALFRED ARTHUR SANDOVAL,
Petitioner,
v.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

ON WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

BRIEF AMICUS CURIAE OF THE STATES OF MASSACHUSETTS, ALABAMA, IDAHO, INDIANA, MISSOURI, MONTANA, NEVADA, NORTH CAROLINA, OHIO, OREGON, PENNSYLVANIA, SOUTH CAROLINA, and TENNESSEE, IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

INTEREST OF AMICI CURIAE.....1

SUMMARY OF THE ARGUMENT.....4

ARGUMENT.....6

A DEFINITION OF THE GOVERMENT'S PROOF IN A CRIMINAL CASE THAT REQUIRES THE JURY, AFTER FULL CONSIDERATION OF THE EVIDENCE, TO HAVE "AN ABIDING CONVICTION, TO A MORAL CERTAINTY," OF THE GUILT OF THE ACCUSED, SATISFIES THE REQUIREMENTS OF THE DUE PROCESS CLAUSE.....6

A. The Moral Certainty Formulation of Proof Beyond a Reasonable Doubt Has Longstanding and Extensive Approval in State Jurisprudence.....8

B. This Court Has Approved Moral Certainty Language As Properly Describing the Degree of Persuasion Necessary for Conviction.....24

C. The California Jury Instruction on Reasonable Doubt Does Not Suffer From the Flaws Identified in Cage v. Louisiana.....33

CONCLUSION.....43

TABLE OF AUTHORITIES

CASES

Addington v. Texas
441 U.S. 418 (1979).....32

Agnew v. United States
165 U.S. 36 (1897).....27

Aime v. Commonwealth
414 Mass. 667,
611 N.E.2d 204 (1993).....3

Apodaca v. Oregon
406 U.S. 404 (1972).....9

Bell v. State
610 N.E.2d 229 (Ind. 1993).....41

Bone v. State
102 Ga. 387,
30 S.E. 845 (1897).....15

Bradford v. State
261 Ga. 833,
412 S.E.2d 534 (1992).....37

Bradley v. State
31 Ind. 492 (1869).....15

Cage v. Louisiana
498 U.S. 39 (1990).....5,34,39

Carlton v. People
150 Ill. 181,
37 N.E. 244 (1894).....14

City of Minot v. Rubbelke
456 N.W.2d 511 (N.D. 1990).....18

Commonwealth v. Beldotti
409 Mass. 553,
567 N.E.2d 1219 (1991).....16

Commonwealth v. Costley
181 Mass. 1, 24 (1875).....14, 25

Commonwealth v. Dinkins
415 Mass. 715,
615 N.E.2d 570 (1993).....10

Commonwealth v. Ferreira
373 Mass. 116,
364 N.E.2d 1264 (1977).....16

Commonwealth v. Robinson
382 Mass. 189,
415 N.E.2d 805 (1981).....33

Commonwealth v. Stellberger
25 Mass. App. Ct. 148,
515 N.E.2d 1207 (1987).....30

Commonwealth v. Webster
59 Mass. (5 Cush.) 295 (1850)..passim

Commonwealth v. Williams
378 Mass. 217,
391 N.E.2d 1202 (1979).....33

Commonwealth v. Wood
380 Mass. 545,
404 N.E.2d 1223 (1980).....21

Davis v. United States
160 U.S. 469 (1895).....40

Donnelly v. State
26 N.J.L. 601 (1857).....10

Dunbar v. United States
156 U.S. 185 (1894).....27

Estelle v. McGuire
112 S. Ct. 475 (1991).....33

Fidelity Mutual Life Ass'n v. Mettler
185 U.S. 308 (1902).....25

Gaskins v. McKellar
111 S. Ct. 2277 (1991).....36

Gaskins v. McKellar
916 F.2d 941 (4th Cir. 1990),
cert. denied,
111 S. Ct. 2277 (1991).....35,36

Hardin v. State
210 Tenn. 116,
355 S.W.2d 105 (1962).....20

Holland v. United States
348 U.S. 121 (1954).....33

Hopt v. Utah
120 U.S. 430 (1887).....30,31

In re Winship
397 U.S. 358 (1970).....26,39

Lanigan v. Maloney
853 F.2d 40 (1st Cir. 1988),
cert. denied,
488 U.S. 1007 (1989).....12

Marshall v. State
528 S.W.2d 823
(Tenn. Crim. App. 1975).....19

Medina v. California
112 S. Ct. 2572 (1992).....32

Miles v. United States
103 U.S. 304 (1881).....26

Monk v. Zelez
901 F.2d 885
(10th Cir. 1990).....34

Morgan v. State
48 Ohio St. 371,
27 N.E. 710 (1891).....12

Morley v. Stenberg
828 F. Supp. 1413
(D. Neb. 1993).....40

People v. Fox
72 A.D.2d 146,
423 N.Y.S.2d 171 (1980).....22

People v. Strong
30 Cal. 151 (1866).....12

Perovich v. United States
205 U.S. 86 (1907).....28

Randolph v. State
266 Ind. 179,
361 N.E.2d 900 (1977).....16

State v. Bryant
334 N.C. 333,
432 S.E.2d 291 (N.C. 1993),
petition for cert. filed
62 U.S.L.W. 3360
(U.S. Nov. 12, 1993)
(No. 93-753).....40

State v. Crenshaw
51 Ohio App. 2d 63,
366 N.E.2d 84 (1977).....13

State v. Desrosiers
559 A.2d 641 (R.I. 1989).....20

State v. Gonzalez
822 P.2d 1214 (Utah 1991).....

State v. Hallock
1993 Tenn. Crim. App. Lexis 694,
at *23 (Oct. 7, 1993).....20

State v. Hammond
241 N.C. 226,
85 S.E.2d 133 (1954).....40

State v. Hoffman
123 Idaho 638,
851 P.2d 934 (1993),
petition for cert. filed,
(U.S. Aug. 24, 1993)
(No. 93-5784).....17,37

State v. Mantia
101 R.I. 367,
223 A.2d 843 (1966).....21

State v. Morley
239 Neb. 141,
474 N.W.2d 660 (1991).....24,37

State v. Rhoades
121 Idaho 63,
822 P.2d 960 (1991),
cert. denied,
113 S. Ct. 962 (1993).....17

State v. Williams
313 Or. 19,
828 P.2d 1006, cert. denied,
113 S. Ct. 171 (1992).....37

Stewart v. State
601 So. 2d 491
(Ala. Crim. App. 1992).....23,37

Taylor v. Kentucky
436 U.S. 478 (1978).....41

United States v. Byrd
352 F.2d 570 (2d Cir. 1965).....35

United States v. Drake
673 F.2d 15 (1st Cir. 1982).....40

United States v. Indorato
628 F.2d 711, (1st Cir.),
cert. denied,
449 U.S. 1016 (1980).....35,40

United States v. Moss
756 F.2d 329 (4th Cir. 1985).....34

Victor v. Nebraska
242 Neb. 306, 494 N.W.2d 565,
cert. granted, 114 S. Ct. 39 (1993)
(No. 92-8894).....24

Wilson v. United States
232 U.S. 563 (1914).....29

OTHER AUTHORITIES

California Jury Instructions - Criminal,
No. 2.90.....passim

North Dakota Pattern Jury Instruction on
Reasonable Doubt, No. 2002.....18

Massachusetts Trial Court Interim Annual
Report (1992).....4

NO. 92-9049

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

ALFRED ARTHUR SANDOVAL,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

ON WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

BRIEF AMICUS CURIAE OF THE STATES OF MASSACHUSETTS, ALABAMA, IDAHO, INDIANA, MISSOURI, MONTANA, NEVADA, NORTH CAROLINA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, and TENNESSEE, IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

The amici states and commonwealths are vitally interested in this case, which challenges California's choice of how to define the government's burden of persuasion in criminal cases. While

every jury must, as a matter of due process, be properly instructed as to the quantum of proof necessary to convict, the manner in which that notion is conveyed to a jury widely varies among the states. So long as the instructions employed do not permit conviction on a lesser quantum of proof than is required by the Due Process Clause, the states should remain free to decide, if they elect to define the term "beyond a reasonable doubt" at all, how that concept should be explained to juries in their jurisdictions.

The California reasonable doubt instruction employed in this case contains precise language derived from Commonwealth v. Webster, 59 Mass. (5 Cush.) 295 (1850). The Webster formulation of the definition of proof beyond a reasonable doubt provides the

basis for instructions used and approved in a number of states for well over a century. The amici have a strong interest in preserving the time-honored definition and could suffer substantially were this Court to determine that it violates due process. While it is not possible to determine the precise number of criminal cases in which juries have been instructed by language similar to that in Sandoval and Webster, it is beyond question that the number is astronomical. For example, in Massachusetts, approximately six thousand individuals are arraigned for criminal charges each week, Aime v. Commonwealth, 414 Mass. 667, 683-684, 611 N.E.2d 204, 214 (1993), and there are over three thousand criminal jury trials each year in the District and

Superior Courts of the Commonwealth. Administrative Office of the Trial Court, Massachusetts Trial Court Interim Annual Report 19, 59 (1992) (1099 criminal jury trials in Superior Court during fiscal year 1992; 2042 criminal jury trials in District Court during calendar year 1992).

SUMMARY OF THE ARGUMENT

Amici demonstrate that California Jury Instruction 2.90 has its source and is grounded in specific language used and approved in the various states and by this Court for well over a century. An instruction which charges the jury that the government must convince them beyond a reasonable doubt of a defendant's guilt, and then informs them that this means that they have an abiding conviction, to a moral

certainty, of guilt, fully conveys the government's burden.

Invalidating any instruction for its mere mention of "moral certainty" in describing the degree of certainty of guilt necessary for conviction is both inappropriate and unwise. The states have, over the years, found different ways to define for their juries the quantum of proof required by the Due Process Clause. The right to continue to make those judgments should be honored.

Cage v. Louisiana does not require the California reasonable doubt instruction be invalidated. It does not contain the quantification of what doubt would be reasonable that was troublesome in Cage. And unlike the Cage instruction, which made but a general

reference to "moral certainty" as the degree of conviction the jurors should have, the California instruction clearly and directly informs that "an abiding conviction, to a moral certainty" of guilt can only be reached upon an evaluation of the evidence. There is no risk that the verdict in this case was based on subjective feelings or emotions apart from the evidence.

ARGUMENT

A DEFINITION OF THE GOVERNMENT'S PROOF IN A CRIMINAL CASE THAT REQUIRES THE JURY, AFTER FULL CONSIDERATION OF THE EVIDENCE, TO HAVE "AN ABIDING CONVICTION, TO A MORAL CERTAINTY" OF THE GUILT OF THE ACCUSED, SATISFIES THE REQUIREMENTS OF THE DUE PROCESS CLAUSE

California Jury Instruction (CJI) 2.90,[1/] like reasonable doubt

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1/ California Jury Instructions - Criminal, No. 2.90 provides:

(footnote continued)

instructions delivered in criminal cases in a number of states, informs the jury that the government's burden of persuasion beyond a reasonable doubt

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(footnote continued)

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

requires the minds of the jury to reach "an abiding conviction, to a moral certainty" of the guilt of the accused. Whether stated positively in terms of the certainty required for proof beyond a reasonable doubt, or described negatively as the state of mental conviction or belief which does not permit a reasonable doubt, the instruction adequately protects against convictions in violation of the Due Process Clause.

A. The Moral Certainty Formulation of Proof Beyond a Reasonable Doubt Has Longstanding and Extensive Approval in State Jurisprudence

The "abiding conviction, to a moral certainty" language in reasonable doubt instructions is generally said to have its source in the jury charge delivered

in Commonwealth v. Webster, 59 Mass. (5 Cush.) 295 (1850), by Chief Justice Shaw of the Massachusetts Supreme Judicial Court.[2/] See Apodaca v. Oregon, 406

2/ "Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of

(footnote continued)

U.S. 404, 412 n.6 (1972).

Apart from Massachusetts, which continues to frame its reasonable doubt instructions in the Webster language, Commonwealth v. Dinkins, 415 Mass. 715, 724, 615 N.E.2d 570, 575 (1993), a number of other states have approved and encouraged the use of Webster's definition specifically, while others have adopted similar language that conveys the core of Webster's "moral certainty" formulation.

For example, in Donnelly v. State, 26 N.J.L. 601, 615 (1857), the New Jersey Supreme Court (Ogden, J.), reviewing a reasonable doubt

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(footnote continued)

those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt...." Commonwealth v. Webster, 59 Mass. (5 Cush.) at 320.

instruction, stated, "Upon a careful search of treatises and reports of trials, I have not found an answer more satisfactory to my mind, than that which was given by Ch. Just. Shaw, upon the trial of John C. Webster." The Court then quoted portions of the Webster charge, including the language that appears verbatim in the second paragraph of CJI 2.90. In 1866, the California Supreme Court itself, reviewing the trial court's charge on the subject of reasonable doubt, found that the instructions given were "substantially in the language of Mr. Chief Justice Shaw, in the case of the Commonwealth v. Webster, 5 Cush. 320, which is probably the most satisfactory definition ever given to the words 'reasonable doubt' in any case known to criminal

jurisprudence." People v. Strong, 30 Cal. 151, 155 (1866). See also Lanigan v. Maloney, 852 F.2d 40, 43 (1st Cir. 1988), cert. denied, 488 U.S. 1007 (1989) ("We find it hard to imagine, without recourse to prolixity, a charge more reflective of the solemn and vigorous standard intended.")

The Supreme Court of Ohio reached the same conclusion in 1891: "Perhaps no more satisfactory definition is to be found than that given by Chief Justice Shaw, in the Webster Case: 'It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.'" Morgan v. State,

48 Ohio St. 371, 377, 27 N.E. 710, 712 (1891).[3/]

In its definition of reasonable doubt, the Illinois Supreme Court in 1894 cited a number of authorities, including Webster, and concluded that proof beyond a reasonable doubt

> is proof "to a moral certainty," as distinguished from an absolute certainty. The two phrases, "proof beyond a reasonable doubt," and proof "to a moral certainty," are synonymous and equivalent. "Each signifies such proof as satisfies the judgment and conscience of the jury, as reasonable men, and applying

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3/ In the 1970's, when Ohio replaced the "abiding conviction to a moral certainty" test in its statutory definition of reasonable doubt with a "present firm conviction" standard, this change was generally considered to reduce the prosecution's burden, to the disadvantage of the accused. See State v. Crenshaw, 51 Ohio App. 2d 63, 366 N.E.2d 84, 85 (1977).

> their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible."

Carlton v. People, 150 Ill. 181, 192, 37 N.E. 244, 247 (1894), quoting Commonwealth v. Costley, 181 Mass. 1, 24 (1875).

Other courts, without referring to Webster, defined reasonable doubt in terms of moral certainty. In 1869, the Supreme Court of Indiana found it to be "such a certainty as would justify to the mind action, not only in matters of importance, but in those of the highest import, involving the dearest interests. Nothing short of this can serve as an example of that moral certainty which should alone authorize a

verdict of guilty." Bradley v. State, 31 Ind. 492, 505 (1869) (emphasis supplied). Similarly, the Georgia Supreme Court, after noting that "[t]he term 'moral certainty' is equivalent to the words 'beyond a reasonable doubt,'" approved of a jury instruction that conveyed the reasonable doubt charge in terms of moral certainty, finding that "as the judge charged that the defendants could not be found guilty until the evidence satisfied the jury of their guilt beyond a reasonable doubt, ... there was no error in further charging that they must be satisfied of their guilt to a reasonable and moral certainty." Bone v. State, 102 Ga. 387, 391, 30 S.E. 845, 847 (1897).

Many states continue to endorse the moral certainty formulation.

California, of course, does so in CJI 2.90, and Massachusetts insists that the government's burden be explained "in close reliance on the time-tested language." Commonwealth v. Ferreira, 373 Mass. 116, 130 n.12, 364 N.E.2d 1264, 1273 n.12 (1977). See, e.g., Commonwealth v. Beldotti, 409 Mass. 553, 562, 567 N.E.2d 1219, 1225 (1991). The Supreme Court of Indiana also recognizes the continuing vitality of the concept of moral certainty. Randolph v. State, 266 Ind. 179, 182-183, 361 N.E.2d 900, 902 (1977).

Idaho requires that jurors be charged in the language of CJI 2.90. The Idaho Supreme Court has held that "the only appropriate instruction on reasonable doubt is the California jury instruction," and that "[a]ny

embellishment or addition to the California reasonable doubt instruction risks misstating the law." State v. Rhoades, 121 Idaho 63, 82-83, 822 P.2d 960, 979-980 (1991), cert. denied, 113 S. Ct. 962 (1993). Recently, the same court reviewed a case in which the reasonable doubt instruction included the following language:

> If you have a reasonable doubt as to the guilt of the defendant, you must acquit him. But if, after going over in your minds the entire case, you have an abiding conviction, to a moral certainty, of the truth of the charge, then you are convinced beyond a reasonable doubt, and you should render your verdict accordingly.

State v. Hoffman, 123 Idaho 638, 851 P.2d 934, 939 n.3 (1993), petition for cert. filed, (U.S. Aug. 24, 1993) (No. 93-5784). The defendant challenged this instruction on due process grounds

"because it required the jury to base their verdict on a 'moral certainty.'" 123 Idaho 638, 851 P.2d at 939. The Court reaffirmed the California jury instruction, finding the challenged instruction was "substantially the same." Id.

The moral certainty formulation is also used in North Dakota's Pattern Jury Instruction on Reasonable Doubt, No. 2002, which states,

> It is that state of mind in which you do not feel an abiding conviction amounting to a moral certainty of the truth of the charge. . . . If, after careful deliberation, you are convinced to a moral certainty that the Defendant is guilty of the crime charged, then you are satisfied beyond a reasonable doubt.

City of Minot v. Rubbelke, 456 N.W.2d 511, 512 n.1 (N.D. 1990). The Supreme Court of North Dakota "strongly

recommend[s] adherence" to the pattern instruction: "[T]he pattern instruction serves as a model, that has withstood the test of time, for attorneys and judges on which to base their respective arguments and decisions." Id. at 515.

In a Tennessee case, after instructing the jury as to the presumption of innocence and the proof beyond a reasonable doubt standard, the trial judge told the jury, "Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense." Marshall v. State, 528 S.W.2d 823, 824 (Tenn. Crim. App. 1975). The defendant argued that it was error for the trial judge to say

that each element must be proven to a moral certainty rather than beyond a reasonable doubt. Id. at 825. The Court disagreed, stating simply, "The use of this language on moral certainty is approved in Hardin v. State, 210 Tenn. 116, 122, 355 S.W.2d 105 [1962]." Id. Accord State v. Hallock, 1993 Tenn. Crim. App. Lexis 694, at *23 (Oct. 7, 1993).

The Rhode Island Supreme Court also approves of the moral certainty formulation. "[A] trial justice must instruct a jury that the prosecution is required to prove a defendant's guilt beyond a reasonable doubt. Proof beyond a reasonable doubt may be properly equated to proof of guilt to a moral certainty." State v. Desrosiers, 559 A.2d 641, 645 (R.I. 1989), citing

Commonwealth v. Wood, 380 Mass. 545, 547, 404 N.E.2d 1223, 1225-1226 (1980), and State v. Mantia, 101 R.I. 367, 223 A.2d 843 (1966). In the Mantia case, the Rhode Island Supreme Court quotes Webster to convey the "constituent elements" of reasonable doubt. Id. at 375, 223 A.2d at 848.

In 1980, a five-judge panel of the First Department of the Appellate Division of the Supreme Court of New York issued a per curiam opinion specifically to address numerous challenges to the "moral certainty" formulation:

> The correct and determinative standard is of course that guilt must be proved beyond a reasonable doubt. And in every case the trial court should explicitly charge that as the determinative standard, using the statutory phrase "beyond a reasonable doubt." CPL § 300.10 subd. 2. But

this does not mean that elaboration and semantic variations on this theme which do not reduce the standard are error . . . .

In particular, it is not error to equate the standard of proof of guilt beyond a reasonable doubt to proof "to a moral certainty." The phrase "to a moral certainty" has been used in this state by generations of trial judges. "Whether the expression used is 'beyond a reasonable doubt,' or 'to a moral certainty,' is immaterial; for they are synonymous, and each simply means that the proof must be such as would satisfy the judgment and consciences of the jurors that the crime charged had been committed by the defendant, and that no other reasonable conclusion was possible."

People v. Fox, 72 A.D.2d 146, 146-147, 423 N.Y.S.2d 171, 172 (1980) (citations omitted).

In a recent Alabama case, the Court of Criminal Appeals affirmed a reasonable doubt instruction that

contained references to moral certainty:

> When I say the State has the burden of proving guilt beyond a reasonable doubt and to a moral certainty, that does not mean that the State must prove the alleged crime beyond every imaginable or speculative doubt or beyond all possibility of mistake, because that would be impossible. A reasonable doubt means an actual substantial doubt. It could arise out of the testimony in the case or it could arise from a lack for which a reason can be assigned. And the expression "to a moral certainty" means practically the same thing as beyond a reasonable doubt, because if you are convinced to a point where you no longer have a reasonable doubt, then you are convinced to a moral certainty.

Stewart v. State, 601 So. 2d 491, 505 (Ala. Crim. App. 1992). Evaluating this instruction in light of the charge as a whole, the Court found that it "was thorough and did not mislead the jury." Id. at 505.

In State v. Morley, 239 Neb. 141, 474 N.W.2d 660 (1991), the Nebraska Supreme Court upheld an instruction that defined reasonable doubt as "such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused," id. at 154-155, 474 N.W.2d at 669-670, against a challenge that it lessened the state's burden of proof.[4/]

B. This Court Has Approved Moral Certainty Language As Properly Describing the Degree of Persuasion Necessary for Conviction

In a number of cases, this Court has also found that the "moral certainty"

4/ The identical instruction is at issue in Victor v. Nebraska, 242 Neb. 306, 494 N.W.2d 565, cert. granted, 114 S. Ct. 39 (1993) (No. 92-8894).

provision appropriately defines the concept of belief beyond a reasonable doubt, and has accepted that "[p]roof to a 'moral certainty' is an equivalent phrase with 'beyond a reasonable doubt.'" Fidelity Mutual Life Ass'n v. Mettler, 185 U.S. 308, 317 (1902), citing Commonwealth v. Costley, 118 Mass. at 24.

This Court has never held that an instruction explaining the concept of proof beyond a reasonable doubt in terms of abiding conviction, to a moral certainty, either reduces the quantum of proof necessary for conviction or invites the jury to decide the case on anything other than the evidence merely because it uses that language. In fact, in a number of cases the Court has rejected challenges to instructions

framed in the Sandoval-Webster language. Apart from demonstrating that proof beyond a reasonable doubt is constitutionally required in criminal cases, see In re Winship, 397 U.S. 358, 362 (1970), these cases show that the Court has never found an instruction to be flawed if it conveys that abiding conviction or moral certainty is the state of mind necessary to be reached, upon consideration of the evidence, to warrant a guilty verdict.

In Miles v. United States, 103 U.S. 304 (1881), the trial court had apparently charged in the language then used in Webster, and endorsed in five other states. While cautioning that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it clearer to the minds of the

jury," id. at 312, the Court indicated that the Webster language used in that case was "certainly very favorable to the accused, and sustained by respectable authority," id. That this Court has found it permissible merely to announce the standard of proof beyond a reasonable doubt, without further definition, see Dunbar v. United States, 156 U.S. 185, 199 (1895), does not mean that a definition such as used in Sandoval-Webster, which properly conveys the quantum of proof, is constitutionally impermissible.

Error in an instruction that a presumption of intent to defraud could only be overcome by sufficiently strong evidence that created a reasonable doubt of its correctness in Agnew v. United States, 165 U.S. 36, 50 (1897), was

neutralized because in other language the trial court had charged the jury that they could only convict if they were satisfied beyond a reasonable doubt that the defendant had the requisite intent. Id. at 51-52. In that case the trial judge used Sandoval-Webster language:

> By a reasonable doubt is not meant a possible doubt, but such doubt arising from the evidence that leaves the minds of the jury in such a state that they cannot say, after having reviewed all the evidence, that they have an abiding conviction, to a moral certainty, of the guilt of the accused.

Id. at 51. An objection to another instruction on reasonable doubt taken from Webster was summarily rejected as "that case has been cited with approval by this court." Perovich v. United States, 205 U.S. 86, 92 (1907).

Similarly, in Wilson v. United States, 232 U.S. 563 (1914), the defendants complained about the following instructions on reasonable doubt:

> [R]easonable doubt is that frame of mind which forbids you to say, all the evidence considered and weighed, "I have an abiding conviction of the defendants' guilt," or as it has been expressed, "I am convinced of the defendants' guilt to a moral certainty." If you can say that you have such a conviction, then you have no reasonable doubt, and your verdict should be guilty. On the contrary, if that is your frame of mind, if you are in the frame of mind where if it was a matter of importance to you in your own affairs, away from here, you would pause and hesitate, before acting, then you have a reasonable doubt.

Id. at 570. The defendant claimed this instruction was flawed because it never specifically stated that the government must prove its case beyond a reasonable

doubt, but the Court approved the instruction, as it "meant nothing less than that, and was sufficiently favorable to the defendants." Id.

In Hopt v. Utah, 120 U.S. 430 (1887), this Court recognized that the Massachusetts Supreme Judicial Court had found "to a reasonable and moral certainty" to be "synonymous and equivalent" with "beyond a reasonable doubt." Id. at 440. Agreeing that informing the jury that a defendant's guilt had to be proved beyond a reasonable doubt, without further explanation, would be sufficient in many cases, this Court specifically noted that in other cases, "some explanation or illustration of the rule may aid in its full and just comprehension." Id. Compare Commonwealth v. Stellberger, 25

Mass. App. Ct. 148, 515 N.E.2d 1207 (1987) (in a close case it is error to give no definition of beyond a reasonable doubt). Warning that some attempts at definition would not be appropriate, the Court found that the Utah court's reference to the certainty with which jurors would act in the important concerns of their own lives, was "as just a guide to practical men as well can be given." Hopt, 120 U.S. at 441.

Hopt supports the view that per se rules forbidding definition of the proof necessary for conviction, or condeming mention of moral certainty, are unwise, and reflects the Court's willingness to permit trial judges, or the various jurisdictions, to define the required degree of certainty as they deem

appropriate. See Medina v. California, 112 S. Ct. 2572, 2577 (1992). So long as a particular definition or formulation does not lessen the degree of proof mandated by due process, states should be given the flexibility to decide the best way to convey the concept. Addington v. Texas, 441 U.S. 418, 433 (1979). Some jurisdictions have determined that the prudent course is not to attempt definition, but, as has been seen, some have elected to retain long-standing approved language, while others have made individual judgments about the value of various parts of definitions approved elsewhere.[5/] Whatever choice is

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5/ For example, while many jurisdictions believe it appropriate to discuss reasonable doubt with the kind of doubt

(footnote continued)

made, individual reasonable doubt instructions will pass muster if there is no reasonable likelihood that the jury applied them in a way that lowered the government's burden of proof or permitted a verdict on other than the evidence. See Estelle v. McGuire, 112 S. Ct. 475, 482 (1991).

C. The California Jury Instruction on Reasonable Doubt Does Not Suffer From the Flaws Identified in Cage v. Louisiana

The only case in which this Court has indicated that "moral certainty" language may raise due process concerns

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(footnote continued)

that would make one hesitate to act, see Holland v. United States, 348 U.S. 121, 140 (1954), or to define it as doubt based on reason and common sense, Massachusetts disfavors both. Commonwealth v. Williams, 378 Mass. 217, 232-233, 391 N.E.2d 1202, 1212 (1979); Commonwealth v. Robinson, 382 Mass. 189, 197-198, 415 N.E.2d 805, 811 (1981).

is Cage v. Louisiana, 498 U.S. 39 (1990). In its per curiam opinion, this Court suggested two reasons why the instruction there was flawed. First, it equated reasonable doubt with "grave uncertainty" and "actual substantial doubt," terms which "suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." Id. at 41. Second, the error created by the use of these terms was compounded when "considered with the reference to 'moral certainty,' rather than evidentiary certainty." Id.[6/]

6/ In a footnote, this Court cited five cases as examples of "[s]imilar attempts to define reasonable doubt [that] have been widely criticized by the Federal Courts of Appeals." 498 U.S. at 41 n.*. Two of these cases found fault with "willingness to act" language, Monk v. Zelez, 901 F.2d 885, 890 (10th Cir. 1990); United States v. Moss, 756 F.2d

(footnote continued)

These faults are not present in the Sandoval-Webster instruction.

The chief deficiency of the instruction discussed in Cage is that it equated doubt with "grave uncertainty" and "actual substantial doubt," effectively reducing the quantum of proof that the prosecution must adduce to convict. Id. at 40-41. See Gaskins v. McKellar, 111 S. Ct. 2277 (1991) (opinion of Stevens, J., respecting the

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(footnote continued)

329, 333 (4th Cir. 1985); two criticized language equating reasonable doubt with "substantial doubt," Taylor v. Kentucky, 436 U.S. 478, 488 (1978); Monk, 756 F.2d at 889; one was concerned that jurors might base a conviction on their feelings rather than on the facts, United States v. Indorato, 628 F.2d 711, 720-721 (1st Cir.), cert. denied, 449 U.S. 1016 (1980); and one criticized defining reasonable doubt as "doubt to a moral certainty," a formulation which may have reversed the burden of proof, United States v. Byrd, 352 F.2d 570, 575 (2d Cir. 1965).

denial of the petition for certiorari).[7] Moral certainty as to guilt is different from grave uncertainty as to guilt. The first equates certainty with the state of mind necessary for conviction while the latter defines the amount of uncertainty needed for an acquittal. It is only the latter that can be construed to reduce the government's burden. In that case jurors could reasonably believe that unless their uncertainty was grave or substantial, they should convict. A

7/ It may be that "grave uncertainty" language is the most serious flaw in Cage. In Gaskins, the trial court had defined reasonable doubt as "a doubt for which you can give reason[,] [i]t is a substantial doubt." Gaskins v. McKellar, 916 F.2d 941, 952 (4th Cir. 1990), cert. denied, 111 S. Ct. 2277 (1991) (emphasis supplied). The charge did not contain "grave uncertainty" language that was in Cage. Gaskins v. McKellar, 111 S. Ct. at 2277 (opinion of Stevens, J.).

number of state courts construing Cage have sustained jury instructions with references to "moral certainty" but which did not have the "grave uncertainty" impediment. See, e.g., Stewart v. State, 601 So. 2d 491, 504-505 (Ala. Crim. App. 1992); Bradford v. State, 261 Ga. 833, 835, 412 S.E.2d 534, 536 (1992); State v. Hoffman, 123 Idaho 638, 851 P.2d at 939; State v. Morley, 239 Neb. at 155, 474 N.W.2d at 670; State v. Williams, 313 Or. 19, 40-42, 828 P.2d 1006, 1020-1021, cert. denied, 113 S. Ct. 171 (1992). The Sandoval-Webster reasonable doubt instruction does not equate reasonable doubt with "grave uncertainty." Nor does it make use of the "actual substantial doubt" formulation criticized in Cage.

California Jury Instruction 2.90 states, in part, that reasonable doubt

> is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

(emphasis supplied). The reference to "moral certainty" clearly describes a state of mind reached "after the entire comparison and consideration of all the evidence."

This juxtaposition is in stark contrast to the Cage instruction, which defined reasonable doubt as "such doubt as would give rise to a grave uncertainty," as "an actual substantial doubt," and concluded with, "What is required is not an absolute or mathematical certainty, but a moral

certainty." Cage, 498 U.S. at 40. It is only when the condemned "grave uncertainty" and "actual substantial doubt" are considered with the general reference to moral certainty as opposed to moral certainty reached upon consideration of the evidence, that a reasonable jury could interpret the instruction to allow a conviction based on a degree of proof below the constitutional requirement. Id. at 41. In fact, the moral certainty phrase in Cage could have led a jury to conclude that they needed to reach moral certainty of doubt in order to acquit.

Because the reasonable doubt standard contemplates a "subjective state of certitude," In re Winship, 397 U.S. at 364, reached by jurors who "are able upon their consciences, to say that

the evidence before them ... is sufficient," id. at 363, quoting Davis v. United States, 160 U.S. 469, 493 (1895), it is not the use of "moral certainty" that was troublesome in Cage, but the absence of any indication of what the jury could rely upon to reach that mental state. Compare United States v. Drake, 673 F.2d 15, 21 (1st Cir. 1982), citing United States v. Indorato, 628 F.2d 711, 721 n.8 (1st Cir. 1980); Morley v. Stenberg, 828 F. Supp. 1413, 1421 (D. Neb. 1993); State v. Bryant, 334 N.C. 333, 343, 432 S.E.2d 291, 297 (N.C. 1993), petition for cert. filed, 62 U.S.L.W. 3360 (U.S. Nov. 12, 1993) (No. 93-753).[8/]

8/ Until the Bryant decision in 1993, the Supreme Court of North Carolina had specifically endorsed the "moral certainty" language from Webster. See State v. Hammond, 241 N.C. 226, 232, 85 S.E.2d 133, 138 (1954).

As defendants are entitled to have their cases decided solely on the evidence, Taylor v. Kentucky, 436 U.S. 478, 485 (1978), the infirmity in Cage is nothing more than the fact that the term "moral certainty," coupled with inaccurate synonyms for reasonable doubt, appears without reference to the evidence. By contrast, in the Sandoval-Webster formulation, "moral certainty" describes the jurors' degree of conviction "after the entire comparison and consideration of all the evidence." See Bell v. State, 610 N.E.2d 229, 235 (Ind. 1993) ("The wording, unlike that in Cage, bases the doubt in terms of consideration of the evidence.")

In the end, CJI 2.90, in four short sentences, conveys all that is

constitutionally required for proof of conviction, granting the defendant the full protection to which he is entitled by the Due Process Clause:

a) he is presumed innocent until the contrary is proved;

b) the people have the burden of proving him guilty beyond a reasonable doubt;

c) reasonable doubt is not mere possible or imaginary doubt;

d) reasonable doubt exists as a result of the state of the case;

e) after considering the evidence, the jury must have an abiding conviction, to a moral certainty, of guilt;

f) if they do not have that abiding conviction, reasonable doubt exists;

g) if there is a reasonable doubt as to his guilt, the defendant must be acquitted.

CONCLUSION

For all the above reasons, the judgment of the California Supreme Court upholding the constitutionality of California Jury Instruction 2.90 should be affirmed.

Respectfully submitted,

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